REPORT
on the Free Movement of Workers in France in 2007

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Introduction

The year 2007 was marked by the adoption of Decree 2007-371, which finalises the process of transposing Directive 2004/38 into French law. This process had started in 2003 and was continued in 2006 with the adoption of two laws relating to immigration. A third law of November 2007 then detailed some provisions applicable to nationals of the European Union. However, it was essentially the adoption of Decree 2007-371, which represents the final stage of the process of transposing the Directive in that it establishes the methods for implementing the provisions established by the law, which now covers the entire field of the Directive. This is the most important text adopted within the area of the free movement of European citizens during the year 2007.

Secondly, Decree 2007-196 moves forward with compliance of French law with Community law as regards the system for recognising diplomas for access to the public sector. This decree establishes the conditions for access to the three corps of the public sector and defines the conditions for taking professional experience into account. It thus brings to an end the incompatibility of French law with Community law.

Finally, Law 2008-324 of 7 April 2008 relating to the nationality of ships' crews puts an end to the resistance of the French authorities to access by European citizens to the posts of ship's captain. It would have meant waiting several years and a judgement regarding France by the Court of Justice in order finally to eliminate French opposition.

Generally speaking, if bringing French law into conformity with Community law represents an obligation, we can imagine that the prospect of holding the presidency of the European Union for the second half of 2008 helped accelerate the transposition process in France.

Chapter I
Entry, Residence, Departure

TRANSPOSITION OF THE DIRECTIVE

- Directive 2004/38 regarding the right of citizens of the Union and their family members to move and reside freely on the territory of the Member States has been the subject of *initial transposition through Article L-121-1 of the Code for the Entry and Residence of Foreigners and the Right of Asylum (CESEDA)*, a more than partial transposition being effected by Law 2003-1119 of 23 November 2003.[1] The law confined itself in fact to inserting, into one chapter and one single article, "nationals of the Member States of the European Union, of other States party to the European Economic Area agreement and of the Swiss Confederation who wish to establish their place of habitual residence in France are not required to hold a residence permit" subject to particular provisions relating to new Member States. This law was followed by a circular dated 26 May 2004[2] and by Decree 2005-1332 of 24 October 2005.[3]

A second transposition procedure was implemented with Law 2006-911 of 24 July 2006 *regarding immigration and integration*[4] which significantly modifies the CESEDA, despite some months' delay in the transposition deadline established by the Directive. Law 2006-911 repeals the preceding texts and adds the phrases, "*as well as residence by their family members*" to the title of Part II of Book I of the CESEDA which now governs,

> "The entry and residence of nationals of the Member States of the European Union or those party to the European Economic Area agreement and Swiss nationals as well as residence by their family members".

Part II is now presented in the form of two chapters:

Chapter I relates to the right of residence;

Chapter II relates to the right of permanent residence.

This format seems to be more in line with the gradual nature of the rights conferred upon European citizens by Directive 2004/38.

Decree 2007-371 of 21 March 2007 relating to the right of residence in France of citizens of the European Union, nationals of other States party to the European Economic Area agreement and of the Swiss Confederation, as well as their family members completes transposition of Directive 2004/38. It establishes the conditions for application of the law, as envisaged in Article L.121-5 of the CESEDA, and details the conditions for residence of nationals of the European Union.[5] It modifies the corresponding provisions of the regulatory section of the CESEDA.

N.B.: The Council of State validated the majority of the provisions of the Decree of 21 March 2007 relating to the conditions of entry and residence for Community nationals, nationals of other Member States of the European Economic Area and of Switzerland and their family members (EC, 19 May 2008, 305670, SOS Racisme).

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1 *French Official Journal*, 27 November 2003.
2 *Interior Official Bulletin*, 2/2004.
3 *French Official Journal*, 29 October 2005.
4 *French Official Journal*, 25 July 2006, p. 11047.
5 NOR: INTD0700061D, *JORF* 22 March 2007, no. 69, p. 5210.

Decree 2007-801 of 11 May 2007 establishes, in particular, the conditions for possession and issue of a work permit for salaried employees who are nationals of a Member State of the European Union, during the period of application of transitional measures regarding the free movement of workers.

A circular of 12 October 2007 determines the proof that can be required of nationals of the Union and similar in order to be issued, upon request, with a residence card[6]. This circular repeals the contradictory provisions of the circular of 6 December 2000, in that it eliminates the obligation of proof of residence for European citizens and other similar nationals, as well as revising the conditions under which proofs of resources of students are required for these nationals.

A circular of 20 December 2007 determines the conditions for the issue of work permits issued to nationals of the new Member States of the European Union during the transitional period and of third-party States, based on the lists of trades experiencing recruitment difficulties.[7]

1. ENTRY INTO FRANCE

Texts in force

As indicated, Part II of Book I of the CESEDA (Legislative Section) governs,

> "The entry and residence of nationals of the Member States of the European Union or those party to the European Economic Area agreement and Swiss nationals as well as residence by their family members".

The conditions for entry to French territory are stipulated by the Decree of 21 March 2007, which introduced Articles R.121-1 and R.121-2 into the CESEDA (Regulatory Section). These provisions aim to transpose Articles 3, 4 and 5 of Directive 2004/38.
Article R 121-1 of the CESEDA states that,

> "All nationals referred to in the first paragraph of Article L. 121-1 who hold *an identity card or a current passport* are admitted to French territory, provided their presence does not pose a threat to law and order.
> Any family member referred to in Article L. 121-3, who is a national of a third-party State, is admitted to French territory provided his presence does not pose a threat to law and order and he holds either, *in the absence of a current residence card, a current passport or visa or, if issued, a document establishing his family relationship.* The consular authority is to issue the required visa upon presentation of proof of his family relationship, free of charge and as soon as possible".

Article R 121-2 of the CESEDA stipulates,

> "The nationals mentioned in the first paragraph of Article L. 121-1 and in Article L. 121-3, who do not hold the entry documents envisaged in Article R. 121-1, are given all reasonable resources enabling them to obtain these documents within a reasonable period or to prove or to confirm by other means that they enjoy the right to move and to reside freely in France, before taking steps to return them".

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6 Circular of 12 October 2007, IMID0768184C, *French Official Journal* of 16 October 2007.
7 Circular of 20 December 2007, IMI/N/07/00011/C.

Jurisprudence

The question of the burden of proof of entry into France

For certain administrative judges, it is up to the citizen of the Union against whom a deportation measure has been taken, to report the proof of his entry into France, although he is exercising his right to free movement for the first three months (Administrative Court of Paris, 18 October 2007, Ms. Viorica MORAR, no. 0712249/5-2, Administrative Court of Paris, 28 November 2007, Ms. Vera MUNTEAN, no. 0713072/3/2, appendix 37).

However, Directive 2004/38 imposes no requirements on free movement other than, *"the requirement to be in possession of an identity card or a valid passport"* (Article 6) and the CESEDA reiterated this provision (Article R.121-3). Consequently, one may wonder about the way in which the European citizen can prove this "entry" into France and on what basis the burden of this proof is his responsibility. Finally, the jurisprudence of the ECJ should be recalled, according to which a citizen of the Union cannot be subject to a visa or equivalent obligation, such as a stamp in his passport or any other formality aimed at authorising entry (ECJ, 3 July 1980, *Pieck*, case 157/79).

2. RESIDENCE

Texts in force

Article L.121-1 of the CESEDA aims to transpose Article 7 of Directive 2004/38, which opens up the *right of residence* on French territory, under certain conditions:

> "Unless his presence poses a threat to law and order, all citizens of the European Union, all nationals of another State party to the European Economic Area agreement or the Swiss Confederation have the right to reside in France *for a period longer than three months* if they satisfy one of the following conditions:
> 1. Exercise of a professional activity in France;
> 2. Availability, for themselves and their family members […] of sufficient resources so as not to become a burden on the social security system, as well as of health insurance;
> 3. Registration at an establishment […] for the primary purpose of undertaking studies or […] vocational training and the guarantee of health insurance and sufficient resources for themselves and their family members […] so as not to become a burden on the social security system;
> 4. If they are direct descendants aged under twenty-one or dependents, direct dependant ascendants, spouses, ascendants or direct dependant ascendants of the spouse, accompanying or joining a national who meets the conditions set forth under 1 and 2;
> 5. If they are spouses or dependent children accompanying or joining a national who meets the conditions set forth under 3".

On the other hand, it should be noted that *Article L.121-2* (resulting from Law 2007-1631 of 20 November 2007) envisages that

> "citizens of the European Union wishing to practise a professional activity in France *remain subject to possession of a residence card for the duration of validity of any transitional measures* possibly envisaged on the subject by the accession treaty of the country of which they are nationals and unless this treaty stipulates otherwise.
> If the citizens mentioned in the previous paragraph wish to practise a salaried activity in a trade characterised by recruitment difficulties and mentioned on a list established at national level by the administrative authority, they cannot be affected by the employment situation on the basis of Article L. 341-2 of the Labour Code.

> On the other hand, once these citizens have successfully completed a training course at a nationally accredited higher education establishment, leading to a diploma at least equivalent to a master's, they are not subject to possession of a residence permit in order to exercise a professional activity in France.

Moreover, Decree 2007-371 provides detail and introduces, in accordance with Directive 2004/38, a distinction between periods of residence shorter than and longer than 3 months.

1) Regarding *residence for a period shorter than 3 months*, the new Article R.121-3 of the CESEDA stipulates that

> "Provided they do not become an unreasonable burden on the social security system, particularly health insurance and welfare, the nationals mentioned in the first paragraph of Article L. 121-1 as well as their family members mentioned in Article L. 121-3 have the right to reside in France for a period shorter than or equal to three months, without conditions or formalities other than those envisaged in Article R. 121-1 for entry on to French territory".

2) *Residence for a period longer than 3 months* is covered by the legal provisions (see above L.121-1 of the CESEDA) stipulated by Decree 2007-371.

Article R.121-4 of the CESEDA, introduced by Decree 2007-371, describes *the conditions required* for exercise of the right to residence and envisages that:

> "Nationals who fulfil the conditions referred to in Article L. 121-1 must be holders of one of the two documents envisaged for entry on to French territory by Article R. 121-1.
> The health insurance mentioned in Article L. 121-1 must cover the services envisaged in Articles L. 321-1 and L. 331-2 of the Social Security Code.
> When required, the adequacy of resources is assessed, taking into account the personal situation of the party in question. The amount required can on no account *exceed the amount of income support* mentioned in Article L.262-2 of the Social Action and Families Code or, if the party in question meets the age conditions for acquiring it, the amount of the solidarity allowance paid to elderly persons, mentioned in Article L.815-1 of the Social Security Code.
> The burden which the national referred to in Article L.121-1 of the CESEDA may impose on the social security system is evaluated by taking into account in particular the amount of the non-contributory social security allowances that have been awarded to him, the duration of his difficulties and his residence.
> The nationals mentioned in the first paragraph of Article L. 121-1, who entered France in order to look for work, cannot be removed on grounds drawn from the illegal nature of their residence provided they are able to prove that they are still looking for work and that they have genuine chances of being hired".

The right of residence of European citizens or similar, who are family members of a citizen of the European Union or similar, is recognised in Article L.121-1, 4. and 5. of the CESEDA:

> "4. If he is a direct descendant aged under twenty-one or dependent, or a dependent direct ascendant, spouse, dependent direct ascendant or descendant of the spouse, *accompanying or joining a national who meets the conditions listed under 1 and 2*;
> 5. If he is the spouse or dependent child accompanying or joining a national who meets the conditions listed under 3."

This right of residence recognised in the capacity as "family member of a European citizen or similar" therefore requires that a European citizen or similar, who is being joined or accompanied, fulfil the conditions imposed in Article L.121-1 1, 2 or 3 of the CESEDA: in other words, he must be "working" or "non-working" or looking for work within the meaning of the aforementioned provisions.

It should be pointed out that the list of family members, established by the CESEDA, does not include the "partner with whom the citizen of the Union has entered into a registered partnership, based on the legislation of the host Member State", as mentioned in Article 2) point 2) of Directive 2004/38. Of particular note is the rejection of a parliamentary amendment aimed at granting a right of residence to persons attached to a Community national by a *Civil Solidarity Pact (PACS)*, on the grounds that this would amount to granting the European citizen an advantage above that enjoyed by a French citizen.[8] Moreover, French legislation regarding alien law has not recognised a right of entry for the foreign partners of nationals, even registered and even if the PACS seems to constitute a situation, "which must be distinguished by the simple relationship of living together".[9] Consequently, the legislator considers that the PACS, although registered, does not confer rights "equivalent" to marriage. The CESEDA is therefore silent on the situation of the "partner with whom the citizen of the Union has entered into a registered partnership, based on the legislation of a Member State if, in accordance with the legislation of the host Member State, registered partnerships are equivalent to marriage and in compliance with the conditions envisaged by the relevant legislation of the host Member State", although envisaged by Directive 2004/38.

The right of residence of third-party nationals in the European Union, family members of a European citizen or similar, is recognised in Article L.121-3 of the CESEDA (modified by Law 2007-1631), which provides that:

> "Unless his presence poses a threat to law and order, the family member referred to under 4 or 5 of Article L. 121-1, depending on the situation of the person he is accompanying or joining, *who is a national of a third-party State*, has the right to reside anywhere on French territory for a period of longer than three months.
> If he is aged over eighteen or over sixteen *if he wishes to practise a professional activity*, he must hold a residence permit. This permit, which cannot be valid for a period of less than five years or a period corresponding to the period of residence envisaged for a citizen of the Union up to a maximum of five years, bears the words, "residence permit of family member of a citizen of the Union". Subject to application of transitional measures envisaged by the Treaty of Accession to the European Union of the State of which he is a national, this permit gives its holder the right to practise a professional activity."

Finally, Article L 121-2 of the CESEDA (modified by Law 2007-1631), which is inspired by Article 8 of Directive 2004/38 regarding the formalities to be carried out in the host Member State, envisages that citizens of the European Union and members of their family wishing to establish *their habitual residence* in France,

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8 LHERNOULD, J.P., La loi Sarkozy clarifie le droit de séjour des ressortissants européens, *Liaisons sociales Europe*, no. 158, 7-20 September 2006, p. 2.

9 In this sense, see Circular no. NOR/INT/D/02/00215/C of 19 December 2002 which explains that: "Thus, the legislator did not intend to liken the situation of foreign nationals who have entered into a PACS with a French national or national of the European Union to that of foreigners married to a French person or a citizen of the Union. In fact and in contrast to this latter category, the simple entry into a PACS with a French person or a national of a Member State of the European Union would not involve ipso jure the issue of a residence card since the length of time of their common life would still have to be established. However, taking into account the specific nature of the situation of these PACS partners, which must be distinguished from the simple relationship of living together, and as you have applied it since April 2002, a pragmatic assessment of the criteria of reality and stability of the relationships mentioned above will usually cause you to regard the condition of the stability of the relationships in France as satisfactory, once the parties in question can prove a period of common life in France equal to one year".

> "are to register with the mayor of the commune of residence within three months following their arrival. Nationals who have not complied with this registration obligation are assumed to have resided in France for less than three months".

The new Article R.121-5 of the CESEDA (modified by Decree 2008-223 of 6 March 2008) states that,

> "A certificate, in accordance with the model established by order of the minister responsible for immigration, is immediately awarded by the mayor to nationals complying with the registration obligation envisaged in Article L. 121-2. This certificate does not establish a right to residence. Possession of it can on no account form a precondition for the exercise of a right or the fulfilment of another administrative formality. The mayor forwards to the Prefect and, in Paris, the chief of police, a copy of the certificates he has issued".

The new Article R.621-1 of the CESEDA (introduced by Decree 2007-371 of 21 March 2007), finally, envisages that failure to comply with the registration formality is punishable, "*by a fine envisaged for fourth-class offences*" (in other words, a fine not in excess of 90 euros).

Based on Article 8 of Directive 2004/38, these provisions aim to explain the administrative formalities to which European citizens or similar are subject when they enjoy a right of residence of more than three months in France, by requiring their registration with the Town Hall of their commune of residence without making it "*a precondition*" to a right.

N.B.: It should be noted that the Council of State has had to pass judgement on the conformity of this registration obligation with Community law and judged that Article R.121-5 of the CESEDA, resulting from Article 1 of the Decree of 21 March 2007, is in accordance with Community law (EC, 19 May 2008, no. 305670, SOS Racisme).

> "This provision envisages the obligation, for a Community national, to register himself at the town hall of the place of residence. A certificate must be issued by the town hall and forwarded to the chief of police. According to the Superior Court, this communication, "which contains no information concerning private life or medical confidentiality, does not undermine the right to respect for private life, guaranteed by Article 2 of the Declaration of Human Rights and of the Citizen, nor the right to respect for private and family life guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms"."[10]

Residence card

a) Exemption from residence card for European citizens and similar

Article L.121-2 of the CESEDA envisages that the nationals referred to in Article L.121-1 of the CESEDA, wishing to establish their habitual residence in France, "*are not obliged to hold a residence card. If they so request, a residence card is issued to them".*

The possibility of applying for issue of a residence card is reserved for certain persons who are bound to do so, either because of their age or because they come from States that do not have a compulsory identity card, or who apply for the card.

Decree 2007-731 thus provides the conditions under which the nationals referred to in Article L.121-1 of the CESEDA who have established their habitual residence in France *within the past 5 years* can request a residence card, depending on their situation:

[10] *Permanent Dictionary of Foreigners*, 2008 update – Bulletin 168.

- a residence card bearing the words, "EC – all professional activities" (Article R 121-10);
- a residence card bearing the words, "EC – non-working" (R 121-11);
- a residence card bearing the word, "Student" (R 121-12);
- a residence card bearing the words, "EC – family member – all professional activities" for family members of citizens or similar (R 121-13).

These residence cards are valid for a maximum period of five years except for students (1 year) and family members (valid for a period equivalent to the period of validity of the residence card issued to the person they are accompanying or joining, up to a maximum of five years).

Article R.121-15 of the CESEDA stipulates that, "a receipt is issued to any national who requests the issue or renewal of a residence permit".

The circular of 12 October 2007 determines the proof that can be required of nationals of the Union and similar in order to be issued, *upon request*, with a residence card[11]. This circular eliminated the obligation of proof of residence for European citizens and similar, as well as revising the conditions under which proof of resources of students are required for these nationals.

Obligation to hold a residence card for citizens subject to transitional measures

On the other hand, the law of 24 July 2006 retained the obligation to hold a residence card, for the transitional period, for workers from Member States that joined the European Union after 1 January 2004.

Article L.121-2 of the CESEDA envisages that, "*citizens of the European Union wishing to practise a professional activity in France* are still required to hold a residence card during the period of validity of the transitional measures possibly envisaged on the subject by the accession treaty of the country of which they are nationals and unless this treaty stipulates otherwise.

> If the citizens mentioned in the previous paragraph wish to practise a salaried activity in a trade characterised *by recruitment difficulties* and mentioned on a list established at national level by the administrative authority, they cannot be affected by the employment situation on the basis of Article L. 341-2 of the Labour Code.
> On the other hand, once these citizens have successfully completed a training course at a nationally accredited higher education establishment, leading to a diploma at least equivalent to a master's, they are not subject to possession of a residence card in order to exercise a professional activity in France."

In terms of access to employment by nationals of the new Member States of the European Union, the French government decided, with effect from 1 May 2004 (beginning of the second phase of the transitional period), to *"gradually lift the restrictions on free movement"*.[12]

Nationals of the Member States of the European Union in question must apply for a residence card and a work permit for access to any salaried employment in France (Article R.121-16 of the CESEDA), but without the employment situation being invoked in certain cases:

[11] Circular of 12 October 2007, IMID0768184C, *French Official Journal* of 16 October 2007.
[12] See in particular Circular DPM/DMI2/2006/200, of the Minister of Employment of 29 April 2006.

- the Circular of the Minister of Employment of 29 April 2006,[13] draws up a list of trades under pressure, access to which is conditional upon the issue of a work permit *but without the employment situation being invoked* for nationals of the eight new Member States of the European Union: "In order to hold employment in one of these trades identified by a ROME code (Operational List of Trades and Jobs), the work permit is maintained but the employment situation mentioned in paragraph 1) of Article R 341-4 of the Labour Code is no longer invoked" (List of 61 trades experiencing difficulties).
- the Circular of the Minister of Immigration of 20 December 2007[14] follows up the Interministerial Committee for Immigration Control (CICI) of 7 November 2007, during which two lists were approved of trades experiencing recruitment difficulties and for which the employment situation will not be invoked: one being open to nationals of the new Member States based on Article L.121-2 of the CESEDA (List of 150 trades open in 2007 experiencing recruitment difficulties).[15]
- An order of 18 January 2008[16] relating to the issue, without invoking the employment situation, of work permits to nationals of the States of the European Union subject to transitional provisions envisages that:

  "Article 1: The employment situation or the lack of a prior search for candidates already present on the labour market cannot be invoked regarding an application for a work permit filed for a national of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Bulgaria or Romania who wishes to practise a salaried activity in a trade characterised by recruitment difficulties and shown on the list appended to the present order".

In terms of a citizen who has successfully completed a training course at a nationally accredited higher education establishment, Article L. 121-2 of the CESEDA stipulates that, when the training course leads to a diploma at least equivalent to a master's, he is not subject to possession of a residence card in order to exercise a professional activity in France.

In terms of the family members of citizens subject to the transitional period, the new Article R.121-16 of the CESEDA stipulates that,

> "Members of their family who are nationals of a Member State of the European Union subject to transitional measures or of a third-party State are also obliged to apply for the issue of a residence permit as well as the work permit envisaged in Article L.341-2 of the Labour Code for the exercise of a salaried activity. However, the spouse or descendants aged under twenty-one or dependent are exempt, if the person they are accompanying or joining has been admitted to the French labour market for a period equal to or longer than twelve months on the date of the accession of their State to the European Union or subsequently."

In the event of failure to comply with these formalities for applying for a residence card and a work permit, nationals of the Member States affected by the transitional provisions may be removed from the national territory (see Removal, below).

Obligation to hold a residence card for family members of nationals of a third-party State

Article L.121-3 of the CESEDA envisages that family members who are nationals of third-party countries remain subject to the obligation to hold a residence card:

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13 Circular DPM/DMI2/2006/200, of the Minister of Employment of 29 April 2006.
14 Circular IMI/N/07/00011/C, of the Minister of Immigration of 20 December 2007.
15 Circular of 20 December 2007, IMI/N/07/00011/C.
16 Order of 18 January 2008, NOR: IMID0800327A, *French Official Journal* no. 0017 of 20 January 2008.

> "Unless his presence poses a threat to law and order, the family member referred to under 4 or 5 of Article L. 121-1, depending on the situation of the person he is accompanying or joining, *who is a national of a third-party State*, has the right to reside anywhere on French territory for a period of longer than three months.
> If he is aged over eighteen or over sixteen if he wishes to practise a professional activity, *he must hold a residence permit*. This permit, which is valid for a period corresponding to the period of residence envisaged for a citizen of the Union, up to a maximum of five years, bears the words, "residence permit of family member of a citizen of the Union". Subject to application of the transitional measures envisaged in the Treaty of Accession to the European Union of the State of which he is a national, this permit gives its holder the right to practise a professional activity."

Decree 2007-371 specifies the conditions of issue for the residence permit, "EC – family member – all professional activities", introducing a new article R. 121-14 into the CESEDA, which stipulates that:

> "Family members who are nationals of a third-party State mentioned in Article L. 121-3 *are to file, within two months of their entry into France*, their application for a residence card together with the documents required for entry to the territory, as well as the proof establishing their family relationship and guaranteeing the right of residence of the national who is being accompanied or joined.
> If the national they are accompanying or joining does not practise a professional activity, they shall additionally provide proof of the means at this person's disposal for guaranteeing their financial coverage and insurance offering the services referred to in Articles L. 321-1 and L. 331-2 of the Social Security Code.
> They receive a residence card bearing the words, "EC – family member – all professional activities", valid for the same period as that to which the national mentioned in L. 121-1 whom they are accompanying or joining is entitled, up to a limit of five years.
> The validity of the residence permit is not affected by temporary absences not exceeding six months per year, nor by absences of a longer period for fulfilling military obligations or by an absence of twelve consecutive months for an important reason, such as pregnancy, childbirth, serious illness, study, vocational training or secondment on professional grounds to another Member State or a third-party country.
> The renewal of the residence card must applied for within a period of two months preceding its expiry date".

Article R.121-15 of the CESEDA mentions the issue of a receipt to all nationals who apply for this permit and stipulates that the residence permit is issued to nationals of a third-party State "*at the latest within 6 months following the filing of the application*", in accordance with Article 10, 1) of Directive 2004/38.

Failure to apply for the residence permit within the required periods implies, in application of Article R.621-2 of the CESEDA, a penalty fine envisaged for fifth-class offences (potentially up to 1500 euros). This fine is higher than that applicable for the failure to register, imposed on European citizens and similar (see above).

N.B.: The Council of State had to pass judgement concerning the conformity of Article R.121-14 of the CESEDA with the provisions of Directive 2004/38 and judged that:

> "Article 1 of the Decree (which creates a new Article R.121-14 in the Code for the Entry and Residence of Foreigners and the Right of Asylum - CESEDA) *contradicts the provisions of the directive since it only envisages a period of two months for a family member* of a Community national or similar, who is himself a national of a third-party country, to file an application for a residence card. In fact Article 9 of the Directive of 29 April 2004 provides that this period, "cannot be less than three months commencing on the date of arrival" on the territory of the host Member State (Dir. 2004/38/EC, 20 April 2004, Art. 9)[17]" (EC, 19 May 2008, no. 305670, SOS Racisme).

[17] Permanent dictionary – 2008 update – Bulletin 168.

Maintenance of residence

Article 12 of Directive 2004/38 provides for the maintenance of the right of residence of family members in the event of the death or departure of the Union citizen.

Decree 2007-371 inserts into the CESEDA Articles R 121-6 to R 121-9 of the CESEDA which involve several of the cases envisaged by Directive 2004/38:

European citizens and similar who enjoy the right of residence maintain their right of residence based on Article R 121-6 of the CESEDA in the following cases:

- if they have been afflicted by temporary disability resulting from illness or accident;
- if they find themselves involuntarily unemployed, duly observed after having been employed for more than one year and if they have registered as a job-seeker with the competent employment office;
- if they undertake vocational training, which must be related to the previous professional activity provided they have been made involuntarily redundant.

The article adds that they maintain their right of residence for six months:

- if they find themselves involuntarily unemployed, duly observed at the end of their fixed-term employment contract for a period of less than one year;
- if they are involuntarily deprived of employment within the first twelve months following the signature of their employment contract and if they are registered as a job-seeker with the competent employment office.

The decree therefore lists the situations in which the right of residence is maintained although the worker is no longer practising a professional activity.

Family members of a European citizen or similar, who hold the nationality of a Member State of the Union and who have been granted residence maintain the right of residence in France by virtue of Article R 121-7 of the CESEDA, in the following cases:

- in the event of the death of the national who was accompanied or joined or if the latter leaves France;
- in the event of the divorce or annulment of the marriage with the national who was accompanied or joined.

Article R.121-7 states, however, that, "for the acquisition of the right of permanent residence envisaged in the first paragraph of Article L. 122-1 of the CESEDA, *they must belong individually* to one of the categories defined in Article L 121-1" (right of residence in France of European citizen or similar).

The case of family members who are nationals of third-party countries is regulated by Article R.121-8 of the CESEDA, which envisages that the right of residence is maintained in the following cases:

- death of the national who was accompanied or joined and conditional upon having established his residence in France as a family member for more than one year before this death;
- divorce or annulment of the marriage with the national who was accompanied or joined:
  - If the marriage lasted for at least three years before the commencement of the legal divorce or annulment proceedings, including at least one year in France;

- If care of the children of the national who was accompanied or joined is that person's responsibility in his capacity as spouse, by agreement between the spouses or by legal decision;
- If particularly difficult situations so require, specifically when the common life has broken down at the initiative of the family member on the grounds of the marital violence he has suffered;
- If, by agreement between the spouses or by legal decision, the spouse enjoys visitation rights with a minor child, upon condition that this right be exercised in France and for the duration required for its exercise.

Article R 121-8 also stipulates the cases in which these persons can acquire the right of permanent residence, i.e.: "for the acquisition of the right of permanent residence envisaged in the second paragraph of Article L.122-1 of the CESEDA, *they must belong individually* to one of the categories defined in 1, 2, 4 or 5 of Article L 121-1".

Finally, and in accordance with the jurisprudence of the Court of Justice, Article R.121-9 of the CESEDA provides that, "In the event of the death of the national who was accompanied or joined or if this person leaves France, the children and the family member who cares for them maintain this right of residence until these children complete their schooling in a French secondary education establishment."

Permanent residence card

The law of 24 July 2006, in transposing the Directive, established a right of permanent residence in the legislative section of the CESEDA.

Article L.122-1 of the CESEDA envisages that a European citizen or similar and his family members, also citizens or similar, who have resided legally and without interruption in France *for the 5 preceding years acquire a right of permanent residence for the entire territory*, unless their presence poses a threat to law and order.

The second paragraph of Article L.122-1 of the CESEDA concerns a family member who is a national of a third-party country, who also acquires a right of permanent residence for the entire territory of France *on condition that he has resided in France legally and without interruption with the European citizen or similar for the 5 preceding years*. Unlike in the preceding paragraph, the family member who is a national of a third-party country *applies for* issue of a residence permit valid for a period of 10 years and ipso jure renewable. If he does not apply for the 10-year residence permit, he becomes liable for a fifth-class offence in application of Article R.621-3 of the CESEDA.

Decree 2007-371 incorporates into the regulatory section of the CESEDA Articles R.122-1 to R 122-5, which establishes the conditions and methods for issue of the permanent residence permit.

Article R.122-1 of the CESEDA envisages that European citizens or similar *can* apply for a residence permit valid for twenty years, subject to fulfilment of the residence conditions envisaged in Article L.122-1 of the CESEDA, without this issue being subordinate to recognition of the right of residence, in accordance with the provisions of Article 16 of Directive 2004/38.

The second paragraph of Article R.122-1 of the CESEDA concerns nationals of Member States of the European Union subject to a transitional system who have acquired a right of permanent residence and who, by derogation from the first paragraph,

> "*are obliged to apply for* a residence card if they wish to practise a professional activity. They must also apply for a work permit in order to practise a salaried activity if they have not been previously admitted to the French labour market for an uninterrupted period equal to or longer than 12 months".

In these situations, their residence permit bears the words, "EC – permanent residence – all professional activities" or, "EC – permanent residence – all professional activities except salaried".

Article R.122-2 of the CESEDA governs the situation of family members of a citizen and makes a distinction between family members who are nationals of third-party countries and family members of a national of a Member State subject to a transitional period:

- family members who are nationals of third-party countries, "apply for issue of a residence permit bearing the words "EC – permanent residence – all professional activities" within a period of two months preceding the expiry of the uninterrupted period of five years of legal residence". The permit, which is valid for ten years, must be issued within a maximum period of six months from the time of filing the application. Its renewal must be requested within a period of two months before its expiry date;
  family members of a national of the European Union subject to a transitional period,

> "are obliged to obtain a work permit in order to practise a salaried activity if they have not previously been admitted to the French labour market for an uninterrupted period equal to or longer than twelve months. In derogation from the first paragraph, their residence permit bears the words, "EC – permanent residence – all professional activities", or "EC – permanent residence – all professional activities except salaried".

Article R.122-3 of the CESEDA stipulates that the continuity of residence, in other words a legal and uninterrupted period of 5 years:

- is not affected by:
  - temporary absences not exceeding 5 years;
  - absences of a longer duration for the completion of military obligations;
  - an absence of a maximum of 12 consecutive months for an important reason, such as pregnancy, childbirth, serious illness, study, vocational training or secondment abroad on professional grounds;
- can be confirmed by any means of proof.

On the other hand, Article R.122-3 of the CESEDA stipulates that the enforcement of a removal decision interrupts the continuity of residence.

Finally, Decree 2007-371 envisages two cases of the issue of the permanent residence card before expiry of the uninterrupted period of five years:

- the European citizen or similar can acquire the right of permanent residence before the period required in the conditions envisaged in Article R 122-4 of the CESEDA:
  1. When he reaches the age envisaged by the legislative or regulatory provisions in force to assert his rights to a retirement pension upon condition of having practised his professional activity there for the past twelve months and of having resided there legally for more than three years;
  2. Following planned retirement and on condition of having practised his professional activity there for the past twelve months and of having resided there legally for more than three years;
  3. Following permanent disability and on condition of having resided there legally and continuously for more than two years;
  4. Following permanent disability and without the condition of the duration of residence if this disability is the result of an industrial accident or an occupational illness opening up the right for the person in question to an annuity payable by a social security organisation;

5. After three years of work and of legal and continuous residence, to practise a professional activity in another State mentioned in Article L. 121-1, on condition that he maintain his residence in France and return there at least once per week. Periods of work completed in this way in another State are regarded as practised in France for the acquisition of the rights envisaged under 1 to 4.
Article R.122-4 of the CESEDA stipulates that the conditions of the duration of residence and of activity envisaged in 1, 2 and 3, do not apply if the spouse of the worker holds French nationality or has lost this nationality following his marriage to this worker.
Moreover, periods of involuntary unemployment duly observed by the competent employment office are also regarded as periods of employment, together with periods of inactivity beyond the control of the party in question and the absence of employment or cessation for reasons of illness or accident.

- Family members, whatever their nationality, who reside with the worker who is a citizen or similar, can acquire the right of permanent residence before the period required under the conditions envisaged in Article R 122-5 of the CESEDA:
1. If the worker himself enjoys the right of permanent residence in application of Article R. 122-2;
2. If the worker dies while still practising a professional activity in France and he had resided there legally and continuously for more than two years;
3. If the worker dies while still practising a professional activity in France, following an industrial accident or an occupational disease;
4. If the spouse of the deceased worker has ceased to hold French nationality following marriage to this worker.

f) Specific situation of job-seekers

The case of European citizens who are looking for work is taken into account in Article R.121-4 of the CESEDA, in application of the jurisprudence of the Court of Justice and of Directive 2004/38.

Article R.121-4 of the CESEDA stipulates that citizens of the European Union and similar who entered France in order to look for work cannot be removed on grounds drawn from the illegal nature of their residence provided they are able to prove that they are still looking for work and that they have genuine chances of being hired.

Article 63 of Law 2007-290 modifies Article L 269-2-1 of the Social Action and Families Code. It states that,

> "Nationals of Member States of the European Community and of the other States party to the European Economic Area agreement who entered France to look for work there and who remain there in this capacity *do not receive income support*".

Within the terms of Article L 380-1 of the Social Security Code, any person residing in mainland France or in an overseas *département* in a stable and legal manner is covered by the general system (of social security) if he is not entitled in any other capacity to services in kind from a health and maternity insurance system. Article L 380-3 of the Social Security Code, modified by Law 2007-290, does however stipulate that the provisions of Article L 380-1 do not apply to nationals of the Member States of the European Community or of other States party to the European Economic Area agreement who have entered France in order to look for work and who remain there in this capacity.

Jurisprudence: "Right to income support of Community nationals"

A Polish national who entered France in 1997 with no residence card, no income, no activity since, no health insurance nor minimum means does not enjoy the right of residence enabling him to obtain the right to income support (RMI) (CCAS, 20 April 2007, no. 061154);

A Belgian national, registered as a job-seeker for 6 months, reasonable period, right to income support (CCAS, 20 April 2007, no. 061155);

A British national and holder of a "non-working" card fulfils the conditions for enjoying a right of residence, therefore a decision to reject the application for income support cannot be based on these grounds (CCAS, 20 April 2007, no. 061020 and no. 061146).

REMOVAL

Article L.121-4 of the CESEDA envisages that,

> "any citizen of the European Union, any national of another State party to the European Economic Area agreement or the Swiss Confederation […] *who cannot prove a right of residence or whose presence poses a threat to law and order* can be the subject, depending on the case, of a decision to deny residence, to deny the issue or renewal of a residence permit or of a withdrawal of this permit as well as of removal measures".

Article L.121-4 of the CESEDA sets forth two grounds which can justify citizens of the European Union and similar forming the subject of a denial of residence or a removal measure:

- if they cannot prove a right to residence;
- if their presence poses a threat to law and order.

In terms of removal from French territory, the CESEDA distinguishes three types of measure:

1) Prefectural decisions to deny a residence card, accompanied by an Obligation to Leave the Territory (OQTF);
2) Prefectural deportation orders (APRF);
3) Prefectural expulsion orders (serious threat to law and order).

1) Prefectural decisions to deny a residence card, accompanied by an Obligation to Leave the Territory (OQTF)

Texts in force (OQTF)

Article L. 511-1 (I) of the CESEDA stipulates the cases in which a foreigner can be the subject of a denial of a residence card, to which the Prefect can add an Obligation to Leave French Territory (OQTF), "on grounds other than the existence of a threat to law and order".

This provision is recent, since it results from the Law of 26 November 2006 and became effective on 1 January 2007. It is surrounded by a particular procedure which envisages a term of one month to mount an appeal with the Administrative Judge, a suspensive period during which the applicant is authorised to stay in France (Article L.512-1 of the CESEDA).

For nationals of a Member State of the Union or similar, Article L. 511-1 I, paragraph 2 of the CESEDA, envisages that the administrative authority which refuses to issue or renew a residence card for a foreigner

> "can *by reasoned decision***,** force a national of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation, to leave French territory if it observes that he *can no longer prove any right to residence as envisaged by Article L. 121-1*".

A national of a Member State may therefore receive notification of a denial of a residence card, accompanied by an OQTF, only if he cannot prove a right of residence as envisaged by Article L.121-1 of the CESEDA.

Administrative practices (OQTF)

Since the entry into force of this provision on 1 January 2007, the Prefectures have issued denials of cards accompanied by an OQTF with respect to nationals of Member States of the EU subject to the transitional period:

Jurisprudence (OQTF)

For examples of denials of cards accompanied by an OQTF approved by the Administrative Judge:

- begging activity, lack of sufficient means within the meaning of Article L.121-1 of the CESEDA, lack of health insurance; recourse to Article L.121-4 of the CESEDA to justify a refusal involving OQTF (Administrative Court of Paris, 28 November 2007, no. 0713072/2/2, Muntean: Romanian national);
- residence of less than three months, the Prefect can take as a basis Articles L.511-1 and L.121-1 of the CESEDA for making this decision (Administrative Court of Paris, 13 December 2007, no. 0716251/5, Rosas).

2) Prefectural deportation orders (APRF)

Article L. 511-1 (II) of the CESEDA states that the administrative authority can, by reasoned decision, decide to deport a foreigner in certain cases[18].

On the other hand, in so far as the CESEDA does not explicitly state this (unlike an OQTF), it is possible to wonder about the fact of knowing whether Community nationals can

[18] Article L.511-1 II envisages that deportation may be ordered by the Prefect in the following cases:
"1. If the foreigner cannot prove that he entered France legally, unless he is holder of a current residence card;
2. If the foreigner has remained on French territory beyond the duration of validity of his visa or, if he is not subject to possession of a visa, the end of a period of three months commencing with his entry into France without being holder of a first lawfully issued residence card;
3. If the foreigner has been the subject of an enforceable Obligation to Leave French Territory taken at least one year beforehand;
4. If the foreigner has not requested renewal of his temporary residence card and has remained on the territory beyond the period of one month following expiry of this card;
5. If the foreigner has been the subject of a final sentencing for counterfeiting, forgery, establishment under a name other than his own or lack of a residence card;
6. Repealed;
7. If the foreigner has been the subject of a withdrawal of his residence card or of a denial to issue or renew a residence card, in cases where this withdrawal or denial have been pronounced in application of the legislative and regulatory provisions in force on the grounds of a threat to law and order;
8. If, during the period of validity of his visa or, if he is not subject to possession of a visa, during the period defined in 2. above, the conduct of the foreigner has posed a threat to law and order or if, during this same period, the foreigner has ignored the provisions of Article L. 341-4 of the Labour Code".

be notified of this deportation decision, based on the absence of the right of residence or a threat to law and order.

Texts in force

Articles L.511-2 and L.511-3 of the CESEDA seem to exclude European citizens from the cases of deportation envisaged in 1, 2 and 8 of Article L.511-1 (II) of the CESEDA:

> Art. L. 511-2. – "The provisions of 1 of II of Article L. 511-1 are applicable to a foreigner who is not a national of a Member State of the European Union: (…)";
> Art. L. 511-3. – "The provisions of 2 and 8 of II of Article L. 511-1 are applicable to a foreigner who is not a national of a Member State of the European Union (…)".

Moreover, points 4 and 7 of Article L.511-1 (II) of the CESEDA are aimed at cases where the persons referred to are obliged to hold a residence card in order to stay in France, which is not exactly the case for nationals of Member States of the EU:

> "*4. If the foreigner has not requested renewal of his temporary residence card and has remained on the territory beyond the period of one month following expiry of this card; (…)*
> *7. If the foreigner has been the subject of the withdrawal of his residence card or of a denial to issue or renew a residence card, in the cases where this withdrawal or this denial has been passed in application of the legislative and regulatory provisions in force, on the grounds of a threat to law and order".*

It therefore seems that it only remains a possibility for the administrative authority to take a deportation decision with respect to a European citizen or similar in the cases covered in the two paragraphs below:

> "*3. If the foreigner has been the subject of an enforceable Obligation to Leave French Territory taken at least one year beforehand; (…)*
> *5. If the foreigner has been the subject of a final sentencing for counterfeiting, forgery, establishment under a name other than his own or lack of a residence card"*;

Now, point 5 of Article L.511-1 II of the CESEDA does not seem to correspond to the only two grounds set forth in Article L.121-1 of the CESEDA on which such a European citizen can be removed (lack of a right of residence; threat to law and order).

Consequently, only point 3 of Article L.511-1 of II of the CESEDA seems to be able to serve as a legal basis for an APRF with regard to nationals of Member States of the EU.

Finally, it should be added that certain categories of foreigners are protected from removal:

Article L.511-4 of the CESEDA envisages that the following are protected from removal:

> "1. A foreigner who is a minor aged under eighteen;
> 2. A foreigner who has every means to prove habitual residence in France since reaching at most the age of thirteen;
> 3. Repealed
> 4. A foreigner who has resided legally in France for more than ten years unless, for the whole of this period, he has held a temporary residence permit bearing the word "Student";

5. A foreigner who has resided legally in France for more than twenty years;
6. A foreigner who does not live in a polygamous situation who is the father or mother of a minor French child residing in France, on condition that he can establish having effectively contributed to the maintenance and upbringing of the child under the conditions envisaged in Article 371-2 of the Civil Code since the birth of this child or for at least two years;
7. A foreigner married for at least three [???] to a spouse of French nationality on condition that the common life has not ceased since the marriage and that the spouse has retained French nationality;
8. A foreigner who has resided legally in France for more than ten years and who, while not living in a polygamous situation, has been married for at least three years to a foreign national covered by 2., on condition that the common life has not ceased since the marriage;
9. A foreigner who is beneficiary of an industrial accident or occupational illness annuity provided by a French organisation and whose permanent level of disability is equal to or greater than 20%;
10. A foreigner habitually residing in France whose state of health requires medical care, lack of which could have exceptionally serious consequences for him, provided he cannot effectively enjoy appropriate treatment in the country to which he is being returned;
11. A national of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation, as well as his family members, who enjoy the right of permanent residence envisaged in Article L. 122-1".
A national of a Member State of the EU is therefore protected from removal after 5 years of legal and uninterrupted residence since he acquires a right of permanent residence which grants him special protection, in accordance with Directive 2004/38.

The same Article L.511-4 of the CESEDA also envisages that,

> "a foreigner who is a national of a third-party country who is a family member, as defined in Article 121-3, of a national of a Member State of the European Union, of another State party to the European Economic Area or of the Swiss Confederation cannot be the subject of a deportation measure on one of the grounds envisaged under 1, 2 and 4 of II of Article L. 511-1".

Administrative practices (APRF)

Despite the doubts expressed above concerning the applicability of APRFs with regard to European citizens (see (a)), the Prefectures have issued deportation orders with respect to nationals of Member States of the European Union, in particular with regard to nationals of "new" Member States (Bulgaria and Romania) subject to a transitional period, during which special provisions are applied to them (see above).

Jurisprudence (APRF)

For examples of APRFs approved or annulled by the Administrative Judge, decisions seem to vary from one jurisdiction to another:

Concerning the deadline for leaving the national territory
Cancellation of the APRF: notification of the removal measure taken regarding the citizen must include an indication of the deadline for leaving French territory, which cannot be longer than one month since the Decree of 21 March 2007 (Administrative Court of Paris, 23 March 2007, no. 0704329, Zawada: Polish national).

Confirmation of the APRF: lack of indication of a deadline for leaving the territory, insufficient circumstances on their own to justify cancellation of the APRF (Administrative Court of Appeal of Douai, 15 November 2007, no. 07DA00917: Romanian national).

N.B.: For the past few months, a practice has been emphasised by associations and networks that support Romanians[19]: some APRFs are not implemented and are accompanied by an "Invitation to leave the territory within one month" in order to respect the deadline envisaged by the Directive (*in particular APRFs based on the threat to law and order characterised by illegal occupation of land*).

Moreover, on the question of the deadline given to leave France, Article 3 of Decree 2007-371 modifies Articles R.512-1-1 and R.522-9 of the CESEDA envisaging, from now on, that the notification of deportation orders and expulsion decisions taken against the nationals mentioned in Article L 121-4 involve the deadline given for leaving the territory. Except in emergencies, this deadline cannot be less than 1 month.

Concerning the concept of threat to law and order

Cancellations of APRF: lack of threat to law and order within the meaning of Community law and right of movement within the framework of a stay of less than three months, lack of need to prove a right of residence (Administrative Court of Lyons, 12 March 2007, no. 0701474, Cleant: Romanian national); lack of threat to law and order within the meaning of Community law, for soliciting on the public highway (Administrative Court of Nantes, 7 June 2007, no. 073176, Mica: Romanian national);

Confirmations of APRF (8. of Article L.511-1 - II): threat to law and order for theft without criminal prosecution or sentencing (Administrative Court of Appeal of Nantes, Mr. X, no. 07NT02122: Romanian national):

> "Considering that Mr. X, a Romanian national, who stated that he entered France at the beginning of May 2007 in possession of an identity card, was questioned on 8 June 2007 *for shoplifting* perpetrated collectively in a department store in Saint-Herblain (Loire-Atlantique) using a bag fitted with a device intended to prevent triggering of the theft detection alarm when customers go through the establishment's checkouts; that during his questioning by the police, Mr. X acknowledged having stolen merchandise; that thus, having regard for all the circumstances of the case, *his conduct posed a genuine, present and sufficiently serious threat for public safety which constitutes a basic interest for society*; that, under such conditions and even though no criminal proceedings were taken against the party in question, the Prefect of Loire-Atlantique, who did not base his decision on physically inaccurate facts, was able legally and without attacking the fundamental right held by citizens of the European Union to move freely on the territory of Member States of the Union, to order the deportation of Mr. X in his order of 9 June 2007";

(See *also* Administrative Court of Appeal of Nantes, 4 May 2007, no. 07NT00611: Romanian national, shoplifting.)

It should be noted that the removal measures taken with regard to European citizens and based on a "threat to law and order" have posed problems with respect to the concept of "threat to law and order" as explained by the ECJ for many years, reiterated in secondary Community legislation and specifically Directive 2004/38 (Articles 27 and 28) and which protects the acknowledged fundamental rights and freedoms of European citizens.

Now, these measures seem to involve principally the "new European citizens" for whom, before 1 January 2007, the Prefectures could take any removal measures envisaged by the CESEDA and for whom a "threat to law and order" in its generic sense, such as found in French law, could form the basis of such a decision. Since the entry into the EU of Romania and Bulgaria, the "new European citizens" fall within the scope of Community law and the concept of "threat to law and order" that is now applicable to them is that which is re-

[19] See specifically, Communiqué of 22 May 2008 of the Romeurope National Human Rights Group following the visit to France of Thomas HAMMEBERG, Human Rights Commissioner of the Council of Europe.

tained for any other European citizen (despite the specific provisions on the subject of residence and access to work during the transitional period). Administrative jurisprudence does not seem to be clear on this point.

However, a recent resolution of the European Parliament, dated 15 November 2007[20], recalls precisely the principle according to which Directive 2004/38, "while envisaging the possibility for a Member State to remove a citizen of the Union, sets this possibility within well-defined limits, in order to guarantee fundamental freedoms" (preamble B). Reference is therefore made to the defined use of the concept of threat to law and order, as developed by the jurisprudence of the ECJ.

The 2007 report by the CIMADE also highlights difficulties on the subject of removal**:**

> "In *2006*, Romanian and Bulgarian nationals represented almost 30% of deportations effectively executed in France. (…) On 1 January 2007, Romania and Bulgaria became full members of the EU. (…) However, throughout the year **2007**, we have observed that Romanian and Bulgarian nationals continued to be the focus of particular attention by the police and prefectural administrations. Thus, they accounted for 20% of the foreigners placed in the Administrative Detention Centre (CRA) in Nantes, almost 10% of those detained at the Centre in Rennes, etc. These high figures are in no way comparable to the number of nationals from the other new Member States of the EU who are placed in detention. The removal measures taken against them are most often disputable. The Administration has regularly used the threat to law and order as the basis of its reasoning. In almost all cases, the offences with which the persons in question were charged were petty crimes and did not generally give rise to any criminal proceedings. They could not, in any of the cases, correspond to the Community definition of the concept of threat to law and order. The fact that some people constituted an "unreasonable burden on the social security system" was also invoked. It seems to us that this reasoning should also be set aside: Romanian residents have access to virtually no social security allowances[21]".

Moreover, the CIMADE report underlines another administrative practice employed mainly with respect to "new European citizens", presented in the form of large-scale "voluntary returns":

> "It should be pointed out that, faced with the legal obstacles in the way of the expulsion of Community nationals, *the Administration decided, during the second half of 2007, to implement another provision: humanitarian repatriation*. This procedure, while it does not involve placing persons in detention, has enabled almost 2,000 Romanians and Bulgarians to be returned. In practice, the services of the French Agency for Reception and Welcoming Foreigners (ANAEM) went to sites occupied by Romanian nationals, most often of Roma descent, to convince them to accept repatriation to Romania. In exchange, persons were paid, upon arrival, the sum of 153 euros per adult and 46 euros per child. At the end of the year, the amount was reduced to 30 euros per person. (…) Under these conditions, we may well wonder as to the genuinely consensual nature of these repatriations… (…)."[22]

Concerning the lack of work permit

Confirmations of APRF:

- seconded workers, late declaration by the employer to the labour inspectorate, practice of an activity without authorisation, basis Article L.511-1 8 of the CESEDA (infringement of Labour Code) (Administrative Court of Appeal of Marseille, 6 December 2007, no. 07MA01296, Zebrak: Polish national);

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[20] Resolution of the European Parliament of 15 November 2007 on application of Directive 2004/38/EC regarding the right of citizens of the Union and their family members to move and to reside freely on the territory of Member States, P6_TA (2007) 0534.

[21] *CIMADE Report*, 2007, pages 6-7.

[22] *CIMADE report*, 2007, pages 6-7.

- practice of an activity without permit or residence card, basis Article L.511-1 8 of the CESEDA (infringement of Labour Code) (Administrative Court of Appeal of Versailles, 13 March 2008, no. 07VE01684, Herta: Romanian national);

Cancellation of APRF: The recent resolution of the European Parliament, dated 15 November 2007,[23] recalls precisely the principle according to which Directive 2004/38, "while envisaging the possibility for a Member State to remove a citizen of the Union, sets this possibility within well-defined limits, in order to guarantee fundamental freedoms" (preamble B). Thus, a removal measure taken solely on the grounds of an infringement of the national rules for access to a salaried activity, particularly during the first three months of residence of a citizen of the Union on the territory of another Member State, seems to be in conflict with Community law.

The Administrative Court of Appeal of Bordeaux has moreover just passed a verdict in this sense, based on national legislation:

> "Article 121-4 of the Code for the Entry and Residence of Foreigners and the Right of Asylum lists a limited number of cases in which Community nationals and their family members can be the subject of a removal measure; that if by virtue of the treaty signed on 25 April 2005, regarding the accession of the Republic of Bulgaria and of Romania to the European Union and the provisions of Article L. 121-1 of the aforementioned Code, Romanian nationals wishing to practise a professional activity in France remain subject to possession of a residence card and of a work permit during the period of validity of the transitional measures applicable to them, *ignorance of these provisions is not among the number of cases, envisaged by the aforementioned Article L. 121-4, in which a removal measure can be taken against them*" (Administrative Court of Appeal of Bordeaux, 14 February 2008).

Regarding the concept of unreasonable burden on the host State

The Council of State, in a judgement Of 19 May 2008, largely confirmed the provisions of the decree of 21 March 2007 relating to the conditions for the entry and residence of Community nationals, similar and their family members (EC, 19 May 2008, no. 305670, SOS Racisme).

In particular, it passed judgement on the right of residence for the first three months of movement of European citizens and similar. It recalls the provisions of Article R. 121-3 of the CESEDA which provides that Community nationals and similar enjoy a right of free movement for the first three months, with no other formality than possession of a passport or a current identity card, "provided they do not become an unreasonable burden on the social security system, specifically health insurance and welfare".

The Council of State therefore considers that this provision of the CESEDA is in accordance with Articles 6 and 14 of Directive 2004/38/EC and that the regulatory power was competent to enact this type of provision.

Nonetheless, some observers regret

> "that the Council of State did not follow through with the reasoning regarding the conformity of the Article criticised with regard to Community law. In fact, while Article 14 of the Directive leaves open the possibility for Member States to terminate the freedom of movement of Community nationals for the first three months of residence if they become an unreasonable burden, *this possibility must be put into perspective*: on the one hand, the concept of "unreasonable burden" in Community texts and in the jurisprudence of the European Court of Justice (ECJ) is a

[23] Resolution of the European Parliament of 15 November 2007 on application of Directive 2004/38/EC regarding the right of citizens of the Union and their family members to move and to reside freely on the territory of Member States, P6_TA (2007) 0534.

> very restrictive concept for the State invoking it in support of an assessment of the maintenance of the right of residence of a Union citizen (ECJ, 20 September 2001, case C-184/99, *Grzelczyk*). On the other hand, the same Article 14 of the Directive of 2004 stipulates that, "reliance on the social security system by a citizen of the Union or member of his family does not automatically involve a removal measure", which the disputed decree did not envisage (Dir. 2004/38/EC, 20 April 2004, preamble 16 and Article 14, § 3)"[24].

Regarding access to the main types of welfare after 3 months

Moreover, we should recall that in France access to most types of social security is conditional upon presence on the territory of longer than three months: this is the case in order to enjoy universal health coverage (CMU, Articles L. 380-1 and R. 380-1 of the Social Security Code); State medical aid – except for minors – (AME, Article L.251-1 of the Social Action and Families Code); income support (RMI, Article L.262-9-1 of the Social Action and Families Code) or the single parent allowance (API, Article L.524-1 of the Social Security Code). Consequently, we may wonder about the concept of "unreasonable burden on the social security system, specifically health insurance and welfare" during the first three months. This is especially true because becoming an unreasonable burden cannot be summarised solely by access to a social security benefit.

On the other hand, they can enjoy, without conditions concerning length of presence in France, emergency housing (arrangement by a *département*) or access to "urgent and emergency care "(Article L. 254-1 of the Social Action and Families Code). Thus, even if a Community national benefits from one of these arrangements, he may not be a burden on the social security system in France.

3) Prefectural expulsion orders (serious threat to law and order)

Article L. 521-1 of the CESEDA (EXPULSION) envisages that, subject to the protection provided in Articles L.521-2 to 521-4 of the CESEDA, "expulsion can be ordered if the presence in France of a foreigner poses a *serious* threat to law and order".

Article L. 521-2 of the CESEDA envisages a form of protection from expulsion measures against a national of a Member State of the European Union, of another State party to the European Economic Area agreement or of the Swiss Confederation who has resided legally in France for 10 years and who can only be the subject of an expulsion measure "if this measure represents an imperative for the security of the State or public safety". However, and by derogation, this national "can form the subject of an expulsion order if he has been finally sentenced to a fixed term of imprisonment at least equal to five years".

Generally speaking, it will be emphasised that the French legislator makes reference to the classic condition of "*threat to law and order*" (except for expulsion where seriousness is required) in its generic sense as found in French law, without going forward with the explicit transposition of the provisions of Chapter VI of Directive 2004/38, which envisages in a restrictive manner the "Limitations on the right of entry and on the right of residence for reasons of law and order, public safety or public health". However, the Directive recalls in detail the principles of the jurisprudence of the Court of Justice in this respect: respect for the principle of proportionality; need to base decision exclusively on the personal conduct of the individual in question; requirement of serious, present and genuine threat. It will therefore be necessary to observe French administrative jurisprudence to note that this room for manoeuvre left to the administrative authority concerning the nature of the *"threat to law and order"*

[24] *Permanent Dictionary of Foreigners*, 2008 update – Bulletin 168.

gives rise to difficulties in the application of criteria of this concept when it is used with regard to European citizens and persons covered by the field of Community law.

This is all the more true since the nature of the "*threat to law and order*" seems to differ when it refers to a "new" national of a Member State of the EU (see above for Romanian nationals) compared to other European citizens for whom the Community concept of "*threat to law and order*" seems to be applicable:

> "An expulsion measure had been taken against a British national sentenced to four years in prison for possession and organised gang transportation of 8.4 tonnes of cigarettes. The Administrative Court of Appeal of Douai considers that the facts "are not sufficient despite their gravity and the fact that they were committed in an organised fashion to justify, on their own, the persistence of a serious threat to law and order, specifically a risk of recidivism (…) the other elements of the file are no more justification for accepting the existence of this threat but, on the contrary, in the same way as those that enabled conditional freedom to be pronounced, are of a nature as to call it into question on the date of the disputed decision". The administrative judge of Douai is more demanding on the degree of seriousness of the threat to law and order when the expulsion of a Community national is at issue" (Administrative Court of Appeal of Douai, 18 October 2007, no. 07DA01151, Webb).

Means and terms of appeal

In terms of public freedom, a field which encompasses alien law, the administrative authority must submit to the principle of legality. This means that administrative decisions must come from the competent authority and have been taken in accordance with the procedures and in the prescribed forms. The administrative authority, most often the Prefecture, pronounces on the foundation of the texts in force on the date of its decision.

The means of law open against administrative decisions are described in the Code of Administrative Justice (CJA). Two major procedural routes exist, to be taken within two months of notification of the said decision:

- Pre-litigation procedures (administrative appeals): petition for reprieve (to the author of the disputed decision); hierarchic appeals;
- Litigation procedures before administrative jurisdictions: appeal for excess of power (appeal for cancellation of the disputed decision); the full jurisdiction dispute (to involve the responsibility of the State).

In terms of alien law, the decisions encountered most frequently are:

- denials of residence card (appeals explained above);
- removal measures corresponding to particular deadlines and procedures:
  - Denial of card accompanied by an OQTF: one-month appeal deadline for (administrative appeal or dispute) authorisation to stay during this period, only the litigation appeal has a "suspensive" effect regarding the decision;
  - APRF: 48-hour appeal deadline to file an appeal, only the litigation appeal has a "suspensive" effect on the decision;
- Expulsion order: special procedures (see Articles L.522-1 to 523-5 of the CESEDA).

It should be pointed out that "classic" administrative appeals or litigation (apart from procedures linked to removal, mentioned above) do not involve a suspensive effect on the disputed administrative decision. However, the applicant can file, with the Administrative Judge, emergency petitions for the purposes of suspending or interrupting execution of the said de-

cision (suspension interim injunction, freedom interim injunction, restraint interim injunction).

Chapter II
Access to Employment

EQUAL TREATMENT IN ACCESS TO EMPLOYMENT

Texts in force

Nationals of the European Union, of the European Economic Area or Switzerland do not need a residence or work permit, in application of Article L 121-1 of the CESEDA, and have free access to all jobs, salaried or non-salaried, with the exception of some jobs in the public sector (see below).

The transitional system applicable to nationals of the new Member States remains subject to common law for access to salaried posts:

1) The 10 new Member States: 1 May 2004 to 1 May 2009 (at the latest);
2) The 2 new Member States: 1 January 2007 to 1 January 2012 (or, in the event of extension, to 1 January 2014).

The law of 24 July 2006 retained the obligation to hold a residence card, during the transitional period, for workers from Member States that joined the European Union *after 1 January 2004*.

Article L.121-2 of the CESEDA provides that,

> "citizens of the European Union wishing to practise a professional activity in France are still required to hold a residence card during the period of validity of the transitional measures possibly envisaged on the subject by the accession treaty of the country of which they are nationals and unless this treaty stipulates otherwise".
>
> If the citizens mentioned in the previous paragraph wish to practise a salaried activity in a trade characterised *by recruitment difficulties* and mentioned on a list established at national level by the administrative authority, they cannot be affected by the employment situation on the basis of Article L. 341-2 of the Labour Code.
> On the other hand, once these citizens have successfully completed a training course at a nationally accredited higher education establishment, leading to a diploma at least equivalent to a master's, they are not subject to possession of a residence permit in order to exercise a professional activity in France."

Consequently, nationals from Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Bulgaria and Romania, unlike those from Malta and Cyprus, remain subject to a work permit and the labour situation can be invoked against them.

The request for a work permit is sent to the competent Departmental Directorate of Work, Employment and Vocational Training (DDTEFP), which can take into account the employment situation subject to the "Community preference" (priority to nationals of a third-party to the European Union).

If the European citizen has lived in France for less than 5 years, the DDTEFP stamps the employment contract and the duration of the residence permit will depend on the term of the employment contract (Article R.121-10 of the CESEDA):

- if > 3 months but < 12 months: residence permit "EC – temporary worker – see APT";
- if > or = 12 months: residence permit "EC – all professional activities" valid 10 years;

Family members who have resided for less than 5 years receive a residence card, bearing the words "EC – family member – all professional activities"(Article R.121-13 of the CESEDA).

If the citizen has had an established residence in France for longer than 5 years, he can be issued with a residence permit valid for 20 years (Article R.122-1 of the CESEDA).

Circular no. 2007-323 of 22 August 2007, regarding work permits, explains the categories of foreigner subject to a permit by detailing the special nature of the transitional period for nationals of the new Member States:

> "1.1. Categories of foreigner subject to the obligation to hold a work permit:
> Those subject to the obligation to hold a work permit:
> – salaried workers who are nationals of a third-party State to the European Union, the Swiss Confederation and those not party to the European Economic Area agreement;
> – salaried workers who are nationals of one of the ten Member States of the European Union during the period of validity of the transitional measures envisaged by the acts of accession (Estonia, Latvia, Lithuania, Hungary, Poland, Czech Republic, Slovenia, Slovakia, Bulgaria and Romania).
> For the ten Member States that have been members since 1 May 2004, with the exception of Cyprus and Malta, and for the ten most recent members, France has in fact decided to introduce a transitional period in matters of the free movement of salaried workers. This transitional period is of a maximum duration of seven years, comprising three periods of two, three and two years respectively. It can be extended by two years in the event of serious disruption to the labour market. During the transitional period, nationals of the ten States remain subject to the obligation to obtain a work permit in advance in order to practise a professional salaried activity on French territory."[25]

In terms of access to employment by nationals of the new Member States of the European Union, the French government decided, with effect from 1 May 2004 (beginning of the second phase of the transitional period), to *"gradually lift the restrictions on free movement"*[26]. The transitional period has therefore been maintained until 1 May 2009 (currently 1 January 2009 in terms of Bulgaria and Romania, but the system can be extended by 3 years and then by 2 additional years).

Nationals of the new Member States of the European Union in question must apply for a residence card and a work permit for access to any salaried employment in France (Article R.121-16 of the CESEDA), but without the employment situation in France being invoked in sectors experiencing recruitment difficulties:

- the Circular of the Minister of Employment of 29 April 2006,[27] draws up a list of trades under pressure, access to which is conditional upon the issue of a work permit but without the employment situation being invoked for nationals of the eight new Member States of the European Union: "In order to hold employment in one of these trades identified by a ROME code (Operational List of Trades and Jobs), the work permit is maintained but the employment situation mentioned in paragraph 1) of Article R 341-4 of the Labour Code is no longer invoked" (List of 61 trades experiencing difficulties);
- the Circular of the Minister of Immigration of 20 December 2007[28] follows up the Interministerial Committee for Immigration Control (CICI) of 7 November 2007, during which two lists were approved of trades experiencing recruitment difficulties and for which the employment situation will not be invoked: one being open to nationals of the

[25] Circular no. 2007-323 of 22 August 2007**,** DPM/DMI2 NOR: IMID0710733.
[26] See specifically Circular DPM/DMI2/2006/200, of the Minister of Employment of 29 April 2006.
[27] Circular DPM/DMI2/2006/200, of the Minister of Employment of 29 April 2006.
[28] Circular IMI/N/07/00011/C, of the Minister of Immigration of 20 December 2007.

new Member States based on Article L.121-2 of the CESEDA (List of 150 trades open in 2007 experiencing recruitment difficulties).[29]

Special cases – exemption from work permit

When a citizen has successfully completed a training course at a nationally accredited higher education establishment, Article L. 121-2 of the CESEDA stipulates that, when the training course leads to a diploma at least equivalent to a master's, he is not subject to possession of a residence card in order to practise a professional activity in France.

Family members of citizens subject to the transitional period, the new Article R.121-16 of the CESEDA stipulates that,

> "Members of their family who are nationals of a Member State of the European Union subject to transitional measures or of a third-party State are also obliged to apply for the issue of a residence permit as well as the work permit envisaged in Article L.341-2 of the Labour Code in order to practise a salaried activity. However, the spouse or descendants aged under twenty-one or dependent are exempt, if the person they are accompanying or joining has been admitted to the French labour market for a period equal to or longer than twelve months on the date of the accession of their State to the European Union or subsequently."

Article R.121-16 of the CESEDA also envisages that,

> "II. – Nationals of Member States of the European Union subject to transitional measures and their family members who are nationals of these same States or nationals of a third-party State, *admitted to the French labour market for an uninterrupted period equal to or longer than twelve months* on the date of accession of their country to the European Union or subsequently and who wish to continue to practise a salaried activity are to apply, upon expiry of their residence card, for a new residence card, without a work permit being required".

A seconded salaried worker is excluded from the field of work permits by a circular of the Minister of Immigration of 22 August 2007 which recalls the conditions for access to the employment market for seconded workers. Thus, *seconded workers* are excluded from the field of work permits in accordance with I or II of Article L. 342-1 of the Labour Code by an employer established on the territory of a Member State of the European Union, the Swiss Confederation or a State party to the European Economic Area agreement. The exemption from a work permit concerns both seconded salaried workers who are nationals of a State of the European Union during the period of validity of the transitional measures and nationals of a third-party State.

In accordance with the jurisprudence of the European Court of Justice (see specifically the judgement of 19 January 2006, case C-244/04, *Commission vs. Federal Republic of Germany*), nationals of third-party States, employed legally and habitually by a company established in a Member State, which is performing a service on the territory of another Member State, cannot be required to hold a work permit in this other Member State. National legislation which subjects the practice of the provision of a service on the territory of another Member State to the issue of an administrative authorisation by the host State constitutes a restriction on the free provision of services within the meaning of Article 49 EC.

This exemption from a work permit is applicable to all seconded salaried workers covered by the provision of transnational services within the meaning of Directive 96/71/EC of the European Parliament and the Council of 16 December 1996, that is:

[29] Circular of 20 December 2007, IMI/N/07/00011/C.

- within the framework of a contract reached between the employer and an addressee in France (case described under 1 of I of Article L. 341-2 of the Labour Code);
- between branches of the same company or between companies in the same group (case described under 2 of I of Article L. 341-2);
- within the framework of a temporary employment contract (II of Article L. 342-1).

This exemption from a work permit does not apply to foreign salaried workers when they are seconded within the framework of a service for their own account (e.g. dismantling a machine on behalf of their employer), since this hypothesis (intended in III of Article L. 342-1 of the Labour Code) is not covered by Community law.

It appears from this jurisprudence that *three criteria* must coincide in order for salaried workers seconded by a Community company to be exempt from a work permit:

1) They must prove an employment contract with the service-providing company prior to the date of the service (see also Article L. 342-1 and Article L. 342-2 of the Labour Code under the terms of which, "a salaried worker seconded within the meaning of the present chapter is any salaried worker of an employer established legally and practising his activity outside France and who, habitually working on behalf of the latter, performs his work at the request of this employer for a limited period on French soil under the conditions defined in Article L. 342-1"). However, no period of seniority in the post can be required in this respect, subject to fulfilment of the following condition:
2) They must practise their main activity in the Member State where the service-providing company is established (cf. specifically preamble no. 41 of ECJ order, 19 January 2006, *Commission vs. Federal Republic of Germany*). In the absence of the seniority of employment with the Community service-provider, this condition can be satisfied by proof of the length of their residence in the State where the service-providing company is established;
3) Salaried workers must be in a regular situation with respect to the work permits required of foreigners in the country of establishment and to social security cover.

In the event of an inspection or request for a residence card in this capacity, the Community company should be requested to prove that the parties in question satisfy these conditions.

These foreigners must in any event apply, for any residence of more than three months, for a residence card bearing the words, "foreign salaried worker of a European service-provider", unless they are nationals of a Member State of the European Union not subject to the transitional system.

Finally, researchers have enjoyed freedom of movement without restriction since 1 May 2004; young workers receiving training who are nationals of States that signed a bilateral convention (Poland and Hungary) can be admitted to work temporarily without invoking the employment situation; nationals of the new Member States with French spouses can apply for a permit, "EC – all professional activities".

In the event of failure to observe these formalities aimed at application for a residence card and a work permit, nationals of Member States affected by transitional provisions may find themselves removed from the national territory (Article L.121-4 of the CESEDA).

Administrative practices

In practice, the transitional period and its particular rules regarding Romanian and Bulgarian nationals have caused difficulties for those wishing to enter employment. At the beginning of 2007, the Prefectures had to take into account these new rules concerning them, as did employers learning of the status of these new European citizens, which had the effect of slowing down their access to employment. Then, the procedure for obtaining a work permit (APT) can take time and is fairly cumbersome (application to Prefecture, file to be completed by the employer for the DDTEFP, decision by the DDTEFP (APT or denial), then issue of a residence card by the Prefecture or denial. Now, some Romanian nationals, having not received a response to the request from their employer or having been denied a work permit, are in an uncertain administrative situation since they are without a genuine right of residence (barring demonstration of the status of "non-working", means, health insurance, etc.), although able to move between France and Romania. They also find themselves in a delicate situation regarding the employer who has chosen to hire them and in an uncertain situation in France since they cannot take up employment although they have to provide proof that they have sufficient means and that they are not "an unreasonable burden" on France.

Jurisprudence

Removal measures have therefore been taken with respect to them, including in the three-month movement period, which gave rise to jurisprudence with respect to:

The question of the burden of proof of entry into France

For certain administrative judges, it is up to the citizen of the Union against whom a deportation measure has been taken, to report the proof of his entry into France, although he is exercising his right to free movement for the first three months (Administrative Court of Paris, 18 October 2007, Ms. Viorica MORAR, no. 0712249/5-2, Administrative Court of Paris, 28 November 2007, Ms. Vera MUNTEAN, no. 0713072/3/2, appendix 37).

However, Directive 2004/38 imposes no requirements on free movement other than, *"the requirement of being in possession of an identity card or a valid passport"* (Article 6) and the CESEDA reiterated this provision (Article R.121-3). Consequently, one may wonder about the way in which the European citizen can prove this "entry" into France and on what basis the burden of this proof is his responsibility. Finally, the jurisprudence of the ECJ should be recalled, according to which a citizen of the Union cannot be subjected to a visa or equivalent obligation, such as a stamp in his passport or any other formality aimed at authorising entry (ECJ, 3 July 1980, *Pieck*, case 157/79).

The question of the lack of work permit

Removal of a Romanian national without a work permit (Administrative Court of Appeal of Marseilles, 6 December 2007, no. 07MA01300, confirmed by Administrative Court of Appeal of Versailles, 13 March 2008, no. 07VE01684: APRF L.511-1, II, 8 of the CESEDA – questioning for infringement of labour legislation);

Removal of a Bulgarian national, residing for more than three months and practising a salaried activity without a work permit (Administrative Court of Rennes, 23 October 2007, no. 074305, Asan Kadri: APRF L.511-1, II, 8 of the CESEDA – questioning for infringement of labour legislation).

Cancellation of an APRF: ignorance of the obligation to hold a work permit and a residence permit in order to practise a salaried activity is not one of the grounds of Article L.121-4 of the CESEDA, which gives a limited list of them, lack of legal basis if APRF based on Article L.511-1 8 of the CESEDA for infringement of the Labour Code (Administrative Court of Appeal of Bordeaux, 14 February 2008, no. 07BX00962, Baranga: Romanian national);

Questions of the concept of unreasonable burden or of deadline granted for leaving the national territory:

See jurisprudence and comments above.

2. Linguistic requirements

Article L.341-2 of the Labour Code provides:

> "In order to enter France with a view to practising a salaried profession there, a foreigner must present, in addition to the documents and visas required by international conventions and the current regulations, an employment contract stamped by the administrative authority or a work permit. He must also demonstrate, on the assumption that he shows willingness to settle permanently in France, *sufficient knowledge of the French language* marked by an accreditation of achievements or undertake to acquire this knowledge following his settlement in France, under conditions that are fixed by a decree in the Council of State".

For the purpose of practising the profession of doctor, dental surgeon or midwife, Article L 4111-1 of the Public Health Code envisages that nobody may practise the profession unless:

- He holds a diploma, certificate or other qualification mentioned in Articles L. 4131-1, L. 4141-3 or L. 4151-5;
- He holds French nationality, Andorran citizenship or is a national of a Member State of the European Community or party to the European Economic Area agreement, of Morocco or Tunisia, subject to application where appropriate either of the rules fixed in the present chapter or of those resulting from international commitments other than those mentioned in the present chapter;
- He is registered on the roll of doctors, of dental surgeons or of midwives; …

Article L 4111-2 of the same Code, modified by Law 2006-1640 of 21 December 2006, stipulates that,

> "the minister responsible for health can, following the advice of a commission comprising in particular delegates of the national councils of the rolls and national organisations of the professions in question, chosen by these bodies, individually authorise to practise persons who hold a diploma, certificate or other qualification allowing the practice of the profession of doctor, dental surgeon or midwife in the country where this diploma, certificate or qualification was obtained.
> These persons must have successfully passed anonymous tests verifying their command of the French language and knowledge, organised by profession, discipline or speciality". This article adds that, "Nobody may enter the knowledge verification tests or the authorisation to practise on more than two occasions".

Decree 2007-123 of 29 January 2007, modifying the regulatory section of the Public Health Code, stipulates the conditions set forth by the legislative provisions. Article D 4111-1 of the Public Health Code is now written as follows:

> "The knowledge verification tests mentioned under I of Article L. 4111-2, which are written and anonymous, include:
> 1. A test to verify basic knowledge;
> 2. A test to verify practical knowledge;
> 3. A test of the command of the French language.
> The methods of organising the tests to verify knowledge and command of the French language are fixed by order of the minister responsible for health.
> For each session, an order determines the professions, disciplines or specialities to which the tests are open, as well as the number of places offered".

Article D.4111-5 stipulates that,

> "Up to the limit of the maximum number of persons eligible to be accepted for these tests, the jury establishes an alphabetical list of candidates accepted. The mark for the first test decides the ex aequo.
> Candidates registered as refugees, stateless, beneficiary of territorial asylum, beneficiary of subsidiary protection or as a French person having returned to the national territory at the request of the French authorities are not subject to the maximum number mentioned in the preceding paragraph. The jury draws up an alphabetical list of candidates accepted.
> In establishing the lists mentioned in the two preceding paragraphs, candidates who obtain a mark below or equal to 6 out of 20 on one of these tests cannot be accepted".

Article L.4221-12 of the Public Health Code, modified by Law 2006-1640 of 21 December 2006, envisages that, "The minister responsible for health can, following the advice of the Supreme Pharmacy Council, individually authorise to practise pharmacy persons who hold a diploma, certificate or other qualification allowing the practice of the profession of pharmacist in the country where this diploma, certificate or qualification was obtained. These persons must have successfully passed anonymous tests verifying their command of the French language and knowledge, organised by profession, discipline or speciality".

Decree 2007-123 aforementioned replaces Article D 4221-1 of the Public Health Code and states that the tests to verify knowledge and the command of the French language mentioned in Article L. 4221-12, which are written and anonymous, include:

> 1. A test to verify basic knowledge;
> 2. A test to verify practical knowledge;
> 3. A test of the command of the French language.
> The methods of organising the tests to verify knowledge and command of the French language are fixed by order of the minister responsible for health.
> For each session, an order determines the professions, disciplines or specialities to which the tests are open, as well as the number of places offered".

Article D.4221-4 of the same Code adds that,

> "Up to the limit of the maximum number of persons eligible to be accepted for these tests, the jury establishes an alphabetical list of candidates accepted. The mark for the first test decides the ex aequo.
> Candidates registered as refugees, stateless, beneficiary of territorial asylum, beneficiary of subsidiary protection or as a French person having returned to the national territory at the request of the French authorities are not subject to the maximum number mentioned in the preceding paragraph. The jury draws up an alphabetical list of candidates accepted.

> In establishing the lists mentioned in the two preceding paragraphs, candidates who obtain a mark below or equal to 6 out of 20 on one of these tests cannot be accepted".

Several orders were passed throughout 2007 relating to the organisation and opening of the tests referred to in Articles L 4111-2 and L 4221-12 of the Public Health Code. This concerns the following texts, in particular:

- Order of 26 February 2007 establishing the composition of the file to be provided to the practice authorisation commission and Supreme Pharmacy Council authorised to examine requests submitted with a view to practising the professions of doctor, dental surgeon, midwife and pharmacist in France;
- Order of 5 March 2007 establishing the methods of organisation of tests to verify knowledge and command of the French language, as envisaged in Articles L. 4111-2 I and L. 4221-12 of the Public Health Code;
- Order of 6 March 2007 concerning the opening of tests to verify knowledge and the command of the French language mentioned in Articles L.4111-2 I and L.4221-12 of the Public Health Code, 2007 session.

3. Recognition of diplomas

Health professions

Article L 4111-2 II of the Public Health Code, modified by Law 2006-1640 of 21 December 2006, states,

> "The minister responsible for health can also, according to the methods envisaged by decree in the Council of State, individually authorise to practise the profession of doctor, dental surgeon or midwife nationals of a Member State of the European Community who hold a diploma, certificate or other qualification issued by a third-party State but which has been recognised in a Member State other than France and allows the person legally to practise the profession there, after having examined the knowledge and qualifications proved by this diploma and by all the training and professional experience acquired in a Member State with regard to those required by the rules in force for access to and practice of this profession".

A joint circular of the Minister of Employment, Social Cohesion and Housing and of the Minister of Health and Solidarity dated 1 March 2007 recalls the conditions for the practice and recruitment in France of doctors, dental surgeons, midwifes and pharmacists.[30] The circular recalls that the aforementioned professions are regulated professions in France and that they must therefore form the subject of conditions regarding nationality, diplomas and registration in the Rolls envisaged for each profession by the Public Health Code.

The circular devotes some of its developments to the conditions for practising as a doctor, dental surgeon, midwife or pharmacist in possession of diplomas obtained in Member States of the European Union. The main objective of the circular is to clarify the conditions for the practice of these professions for persons who obtained a diploma in the new Member States. Firstly, it puts forward a general principle, according to which diplomas issued by a Member State of the European Union and marking the successful completion of training that commenced after the accession of the country to the European Union meet certain minimum training requirements envisaged by European directives and, in this capacity, enjoy auto-

[30] Circular no. DHOS/M1/M2/DPM/DMI2/2007/85 of 1 March 2007 recalls the conditions for practice and recruitment in France of doctors, dental surgeons, midwives and pharmacists.

matic recognition. However, the circular adds that, in order to facilitate the application of the directives by the Member States, the latter can request the holders to provide, with the diploma, a certificate of conformity with the directives.

Regarding the particular case of diplomas issued by the 10 Member States that joined on 1 May 2004, the circular identifies two situations:

- Diplomas marking the successful completion of training courses starting after 1 May 20044 all enjoy automatic and unconditional recognition;
- Diplomas marking the successful completion of training courses starting before 1 May 2004 are assumed not to be in conformity, in other words not meeting the minimum training requirements envisaged in the directives.

The circular envisages, however, by groups of States, the conditions under which this assumption of non-conformity can be counteracted.

Regarding Poland, Hungary, Cyprus and Malta, the assumption of non-conformity can be counteracted in 2 ways:

- A certificate of conformity (drawn up by the competent authorities of the Member State that issued the diploma. This certificate states that the diploma is equivalent to the one referred to in the appendix to the directive in question and that it marks the successful completion of a training course that conforms to the minimum training requirements set forth in the directive);
  OR
- A certificate of the rights acquired (issued by the authorities of the Member State on whose territory the holder of the diploma practised). This certificate states that its holder has devoted himself effectively and lawfully to the practice of his profession for at least 3 consecutive years of the 5 years preceding the issue of the certificate. The circular emphasises the particular case of Polish and Romanian midwifery diplomas, for which the number of years required is variable.

With regard to Estonia, Latvia, Lithuania, the Czech Republic, Slovakia and Slovenia, the assumption regarding diplomas marking the successful completion of a training course commencing after the dates of the independence of these States can be counteracted in the following ways:

- A certificate of conformity; or
- A certificate of rights acquired.

Regarding diplomas marking the successful completion of training courses that commenced before the dates of independence, the circular states that they cannot be in conformity with the directives and, in order to obtain recognition, their holders must provide:

- A certificate of validity at legal level (this certificate states that these diplomas have, on the territory of the Member State in question, the same legal validity and grant the same rights as qualifications awarded by the new State in terms of access to activities and the practice of the profession);
  AND, compulsorily
- A certificate of rights acquired.

Finally, regarding Romania and Bulgaria, the circular refers to the provisions of Directive 2006/100/EC. It emphasises that, generally speaking, the assumption of non-conformity may be counteracted by producing the certificate of conformity or certificate of rights acquired.

An order of the Minister of Health and Solidarity of 13 February 2007, which is aimed at Directive 2005/36, establishes the list of diplomas, certificates and other **midwifery** qualifications issued by the Member States of the European Union, States party to the European Economic Area agreement and the Swiss Confederation, referred to in Article L. 4151-5 (2) of the Public Health Code.[31]

An order of the Minister of Health and Solidarity of 13 February 2007, which is aimed at Directive 2005/36, establishes the list of diplomas, certificates and other pharmacy qualifications issued by the Member States of the European Union, States party to the European Economic Area agreement and the Swiss Confederation, referred to in Article L. 4151-5 (1) of the Public Health Code.[32]

An order of 7 February 2007 modifies the order of 10 June 2004, establishing the list of diplomas, certificates and other qualifications as general care nurse issued by the Member States of the European Union or other States party to the European Economic Area agreement mentioned in Article L. 4311-3 of the Public Health Code. A new Article 4 bis is inserted into the order of 10 June 2004, which states:

> The practice in France of the profession of nurse is opened to nationals of Member States of the European Union or other States party to the European Economic Area agreement by the diplomas, certificates or other qualifications as general care nurse mentioned below, marking the successful completion of training acquired in Romania or commenced in this State before the date of its accession to the European Union and which do not fulfil the training conditions envisaged by Directive 77/453/EEC.
> The nursing diploma marking the successful completion of higher education (Certificate of professional competence as general medical assistant), issued by a *scoala postliceala*, accompanied by a certificate issued by the competent Romanian authorities, certifying that these nationals have effectively and lawfully devoted themselves to the activities of general care nurse in Romania for at least five consecutive years of the seven years preceding the date of issue of the certificate and that these activities have included full responsibility for the programming, organisation and administration of nursing care to the patient".

An order of the Minister of Health and Solidarity of 27 February 2007 concerns the opening up of the special hospital entrance examination at European level to French doctors and nationals of Member States of the European Union during the 2007-2008 university year.[33]

Salaried workers in non-profit social and medical-social services establishments whose operating expenses are borne, in whole or in part, directly or indirectly, either by legal entities under public law or by social security bodies

Law 2007-293 of 5 March 2007, reforming child protection incorporates a new part, called "Recognition of professional qualifications" into the Social Action and Families Code[34]. The articles inserted are as follows:

Article L. 461-1. – The conditions and methods of recognition of the professional qualifications of nationals of a Member State of the European Community or of another State

[31] *French Official Journal*, 24 February 2007.
[32] *French Official Journal*, 24 February 2007.
[33] *French Official Journal*, 7 March 2007, NOR: SANH0720933A
[34] *French Official Journal*, 6 March 2007.

party to the European Economic Area agreement wishing to gain access to professional activities in the field covered by one of the joint conventions mentioned in the first paragraph of Article L. 314-6, which envisages the possession of a social work diploma created by virtue of Article L. 451-1, are fixed in Articles L. 461-2 to L. 461-4.

Article L. 461-2. – In order to enjoy recognition of their professional qualifications, the candidates referred to in Article L. 461-1 must prove:

1. A diploma, certificate or qualification allowing the practice of similar professional activities forming the subject of regulation in the Member State or other State of origin or provenance and of a level equivalent or immediately inferior, with regard to Articles 11 and 13 of Directive 2005/36/EC of the Parliament and of the Council of 7 September 2005, regarding the recognition of professional qualifications, to that envisaged by the joint convention and issued:

   a) Either by the competent authority of this State and marking the successful completion of training acquired predominantly in the European Community or the European Economic Area;

   b) Or by a third-party country on condition that the competent authority of the Member State or other party State that recognised the diploma, certificate or other qualification certify that its holder has at least three years of professional experience in this State;
2. Or a diploma, certificate or qualification and the full-time practice of similar professional activities for at least two years of the preceding ten years in a Member State or other party State of origin or provenance that does not regulate access to or the practice of similar activities.

   However, this condition of two years of professional experience is not required when the training qualification(s) held by the applicants mark(s) the successful completion of training regulated by the Member State of origin.

Article L. 461-3. – When the training received by the applicant is shorter by at least one year than that envisaged by the joint convention or if this training concerns substantially different subjects, in terms of duration or content, from those featured on the French diploma course and of which knowledge is essential for the practice of the professional activities in question, specifically unless the knowledge he has acquired during his professional experience is such that it renders this verification useless, the applicant chooses either to submit to an aptitude test or to complete a conversion course that cannot exceed three years in duration.

Article L. 461-4. – The decision to recognise the professional qualifications of the applicant is reasoned. It must be made at the latest within a period of four months from the date of the receipt, which is issued upon reception of the complete file.

Management of social or medical-social establishments or services

Decree 2007-221 of 19 February 2007 incorporates the following provision into the Social Action and Families Code:[35]

> "Article D. 312-176-11. – Nationals of Member States of the European Community and of other States party to the European Economic Area can manage one or more social or medical-social establishments or services if they meet the requirements of levels of professional qualifications and certificates equivalent to those defined in Articles D. 312-176-6 to D. 312-176-10".

[35] *French Official Journal*, 21 February 2007.

Other professions

An order of 30 March 2007 establishes the conditions for training in canyoning by nationals of a Member State of the European Union or of a State party to the European Economic Area agreement.[36] It determines the conditions required to practise this activity in return for payment as well as the procedure for applying for recognition of qualifications or professional experience. Article 3 of the order stipulates in particular that,

> "When a substantial difference in level exists between the skills certified by the training qualifications or the professional experience asserted by applicants and the skills established in appendix I of the present order and if, in terms of the skills certified by the training qualifications, this difference is not likely to be covered by professional experience, the Prefect of the *département* can require applicants to submit, at their discretion, to an aptitude test or a conversion course, the duration of which cannot exceed two years. However, in the event that applicants assert only their professional experience, the choice between the aptitude test and the conversion course is made by the Prefect.
> It is deferred to the recognition of the qualification by reasoned decision for the duration needed for completion of the aptitude test or the conversion course".

Jurisprudence, "regulated professions"

The requirement of professional experience of at least two years in order to obtain an equivalent of the State sports instructor Diploma is incompatible with Community regulations: The Italian applicant requested admission of his Italian qualification of *maestro di tennis* as equivalent to the State sports instructor diploma. He received a denial from the Director for Youth and Sports of the *département* of Corrèze, a decision which was confirmed by the Administrative Court of Limoges. The applicant invoked Directive 92/51/EEA of 18 June 1992 and maintained that he was not obliged, at the time of application for admission of the Italian qualification as equivalent to the Diploma, to demonstrate two years of professional experience acquired in Italy, although required by the Decree of 21 September 1989. The provisions of the decree were judged incompatible with Article 8 of Directive 92/51/EEA of 18 June 1992, in that they require two years of professional experience in addition to the diploma (Administrative Court of Appeal of, Bordeaux, 7 May 2007, no. 05BX01188, Latreille).

[36] *French Official Journal*, 14 April 2007, NOR: MJSF0750486A

Chapter III
Equality of Treatment

1. WORKING CONDITIONS, SOCIAL AND TAX ADVANTAGES

Family allowances

The system of family allowances is contained within the Social Security Code. Article L 512-1 of this Code states, "all French or foreign persons residing in France and caring for one or more children residing in France shall receive, for these children, family allowances under the conditions set forth in the present book".

Law 2007-1786 of 19 December 2007[37] modifies Article L 512-2 relating to the granting of family allowances to nationals of the European Union. This Article states,

> "Nationals of the Member States of the European Community, of other States party to the European Economic Area agreement and of the Swiss Confederation who meet the conditions required for regular residence in France shall ipso jure receive family allowances under the conditions stated in the present book, where residence is assessed under the conditions stated in Article L 512-1".

On the other hand and in application of Article L 512-5 of the Social Security Code, family allowances under the French system cannot be combined with child allowances paid in application of international treaties, conventions and agreements signed by France or in application of foreign legislation or regulations, nor with child allowances paid for an international organisation.

Decree 2007-354 of 14 March 2007 concerns methods of application of the residence condition in order to receive certain allowances. Thus, the new Article R 155-6 of the Social Security Code states that those who are regarded as residing in France for the purposes of receiving family allowances are those persons who have their household or their place of principal residence on the territory of mainland France or in an overseas territory. The Article stipulates that:

- the household includes the place where the persons usually live, in other words, the place of their habitual residence, provided this residence is of a permanent nature;
- the principal residence condition is met when the beneficiaries are personally and effectively present mainly on the territory of mainland France or in an overseas *département*. (…) those assumed to have their place of principal residence in France are persons who live there for more than 6 months during the calendar year when the allowances are paid;
- residence in France can be proved in any way.

Single-parent benefit

In application of Article L 524-1 of the Social Security Code, "All single persons residing in France and solely responsible for one or more children shall receive a family allowance, the

[37] Law no. 2007-1786 of 19 December 2007 for financing social security for 2008, *French Official Journal* of 21 December 2007.

amount of which varies depending on the number of children". The system for allocating the single-parent benefit to citizens is regulated as follows:

> "It is paid to nationals of Member States of the European Community and of other states party to the European Economic Area agreement who request it and who have resided in France for longer than three months, under the conditions set forth in Articles L. 121-1 and L. 121-2 of the Code for the Entry and Residence of Foreigners and the Right of Asylum. However, this three-month residence condition is not applicable:
> - to persons practising a stated professional activity in accordance with the applicable legislation;
> - to persons who have practised such an activity in France and are either temporarily unfit for work on medical grounds or who are following vocational training within the meaning of Articles L. 900-2 and L. 900-3 of the Labour Code, or who are registered on the list referred to in Article L. 311-5 of the same Code;
> - to ascendants, descendants and spouses of the persons referred to in the two paragraphs above."

However, Article 63 of Law 2007-290 passed on 5 March 2007 inserted into Article L 524-1 of the Social Security Code the following provision, "Nationals of the Member States of the European Community and of the other states party to the European Economic Area agreement who have entered France in order to look for work and who remain there in this capacity, do not receive the single-parent benefit". Thus, European citizens looking for a job on the territory of another Member State cannot be paid the single-parent benefit.

Universal Health Coverage (CMU)

Law 2007-290 passed on 5 March 2007 limits access to the general system of social security and therefore to Universal Health Coverage (CMU) of non-working citizens and is aimed in particular at citizens who entered France to look for work there. Article 63 of the Law modifies Article L 380-3 of the Social Security Code and envisages an additional case of exclusion from the general system of social security envisaged in Article L 380-1 of the Social Security Code[38]. Thus, "nationals of the Member States of the European Community and of other States party to the European Economic Area agreement, who have entered France to look for work and who remain there in this capacity" cannot lay claim to the general system and consequently the basic CMU.

Based on this legislative modification, circular of 23 November 2007 of the Minister of Health recalls the rules applicable to non-working Community nationals regarding access to basic Universal Health Coverage and additional Universal Health Coverage.[39] Based on the "theory of the trials of life", already developed on the subject of access by citizens to Income Support (RMI), the circular distinguishes between a citizen wishing to settle in France and a citizen who is already present on the territory.

Regarding citizens wishing to settle in France, the circular sets forth the principle of the inaccessibility of basic CMU. Thus, "a non-working or student Community national who settles on French territory although he does not have adequate means and/or health coverage does not have the right to reside there. In this case, he will be lawfully refused access to CMU and additional CMU and he will have to provide health coverage for himself by taking

[38] Article L 380-1 of the Social Security Code: "Any person residing in mainland France or in an overseas *département* in a stable or regular manner is covered by the general system when he is not entitled in any other way to the services in kind of a health and maternity insurance scheme".

[39] Circular DSS/DACI/2007/418 of 23 November 2007 relating to payment of basic CMU and additional CMU to nationals of the EU, the EEA and Switzerland, residing or wishing to reside in France as non-workers, students or job-seekers.

out insurance". However, the circular recalls that the system of coordinating social security systems does, under certain conditions, allow for permanent or temporary continuity in terms of rights. In this case, the text stipulates that it is up to the health insurance funds to remind interested parties, each time this is necessary, of the conditions under which continuity of rights in terms of health insurance is possible through health coverage other than French health coverage.

Regarding citizens who come to look for work in France, the circular indicates that they have no right to CMU. It points out that this solution is the result of the possibility offered by the directive to restrict access to social security allowances for this particular category of person.

Regarding persons who already resided legally on French territory, the circular indicates that, "When a non-working person who had a right of residence applies for CMU because he no longer has health coverage, he must not automatically be refused payment of the allowance. A deeper study of the situation should then be performed". The solution identified by the circular is based specifically on the *Grzelczyk* jurisprudence of the Court of Justice. Thus, the health insurance funds may receive requests for coverage on behalf of persons who fulfilled the initial conditions for right of residence but who, taking into account new circumstances, no longer fulfil them in application of the theory of "the trials of life". This may be a request made by a Community national for himself and his family. It may also be a request from a family member accompanying the Community national if the latter dies or divorces. The circular stipulates that the theory of the trials of life "does not immediately lead to the loss of the previously acquired right to reside [and] can lead, depending on the situation, to payment of an allowance (RMI) or to the beginning of a right to CMU".

Thus, two situations are conceivable:

- The person has never, since settling on the territory, had the means to guarantee his independence nor health insurance covering all risks. If the party in question remains on the territory, this would not lead him to acquire the right he did not have when he settled there. He must be refused basic CMU as well as, where appropriate, additional CMU;
- The person has in the past had sufficient means to guarantee his material independence as well as health insurance covering all risks. The trials of life (loss of employment, separation or death of spouse, termination of marital life, refusal of insurance in the event of serious and unforeseeable illness, at the time of a change of residence, etc.) can lead the person to request access to CMU. Basic CMU can be granted to him as well as, where appropriate, additional CMU. The circular stipulates that the limit of this right is that, "the beneficiary must not become an unreasonable burden on the public finances of the host Member State", thus referring to the Community provision.

In order to be entitled to CMU, the applicant must demonstrate:

- that he has, in the past, had the right of residence and specifically sufficient means to guarantee his material independence as well as health insurance covering all risks. Within this context, the technique of the body of indices can be used and any useful document can be requested in order to determine whether the interested party had sufficient means to meet his needs when he arrived in France. However, a health insurance certificate will have to be provided;
- the reality of his current situation (current judicial proceedings in the event of separation, death certificate of spouse, etc.) and demonstrate the impact of the event in ques-

tion on the acceptance of his health coverage (loss of income making it impossible to finance coverage);
- that he has maintained a stable residence in France for an uninterrupted period of more than three months under the conditions of common law, with the exception of categories exempt from this period, referred to in Article R 380-1 of the Social Security Code.[40]

The circular stipulates, for the attention of the national health insurance funds that an examination of the situation of the applicant is not required if he receives the RMI, In this situation, CMU is awarded rightfully and no additional investigative measures on the part of the national health insurance fund are necessary.

Finally, it is stated that the refusal to award CMU must be justified in writing and must, in order to be valid, be based directly on the lack of residence in France or on the lack of justification submitted by the applicant that he has, at a given time, acquired the right of residence in France by having had sufficient means and health insurance.

Lastly, the circular comes back to the case of certain non-working Community nationals who were awarded CMU, in application of circular DSS/2A/DAS/DPM 2000/239 of 3 May 2000, although they ought to have held medical cover prior to their settlement in France. The text considers that going back over the membership of these nationals of CMU would mean calling into question a right to residence which has been de facto recognised in their favour, although they would have received CMU in conflict with the law in force.

Initially, the National Health Authorities (CPAM) should examine the situations of these persons in order to determine whether they fulfil one or more of the following conditions:
- either eligibility for a right of permanent residence in France;
- or enjoyment of a French old-age pension assuming that they had worked in our country and had reached the age of 60. In this context, their retirement pension – even minimum – entitles them to French health coverage;
- or enjoyment of an old-age pension from their State of origin or from another Member State of the Union and, in this case, they will have to be invited to carry form E 121 in order for their health insurance to be covered by the State which pays their pension.

[40] Article R 380-1 of the Social Security Code: "I. – In order to be members or affiliates in the capacity of beneficiaries of the general system, the persons referred to in Article L. 380-1 must prove that they have resided in mainland France or in an overseas *département* for an uninterrupted period of more than three months.
However, this three-month period is not imposed upon:
1. Persons registered at an education establishment as well as persons coming to France as trainees within the framework of cultural, technical and scientific cooperation agreements;
2. Beneficiaries of the following:
- family allowances envisaged in Article L. 511-1 and in Chapter V of Title V of book VII, employment incentives for caring for young children, envisaged in Title IV of book VIII;
- benefits for elderly persons envisaged in Title 1 of book VIII;
- housing benefit envisaged in Article L. 831-1 and housing grant envisaged in Article L. 351-1 of the Building and Housing Code;
- social security services referred to in Title III of the Social Security and Families Code;
- income support introduced by Law 88-1088 of 1 December 1988;
3. To persons recognised as refugees, admitted for the purposes of asylum or who have applied for refugee status.
II. – Persons of foreign nationality must also prove that they are in a legal situation with respect to the legislation concerning the presence of foreigners in France at the time they become members.
III. – In order to receive the services in kind of health and maternity insurance, the persons mentioned in Article L. 380-1 must reside in France in accordance with the provisions of Article R. 115-6".

When this case-by-case examination does not enable health coverage to be granted, the persons in question will maintain their French health insurance via basic CMU.

Depending on the case, it is necessary to exercise caution with regard to a change in the situation of these persons and, in particular, of those among them who subsequently became recipients of an old-age pension. In the event of the said pension opening up a right to health care, this should be pointed out to the persons in question and taken into consideration.
Of course, all this work involved in analysing situations should take into account the situation of the parties in question with regard to the concept of eligibility, as defined in Articles L 161-14 and L 313-3 of the Social Security Code (CSS).

Income Support (RMI)

Article 63 of Law 2007-290 passed on 5 March 2007 modifies the wording of the last paragraph of Article L 262-9-1 of the Social Action and Families Code. This provision states that, "Nationals of Member States of the European Community and of the other States party to the European Economic Area agreement who entered France to look for work there and who remain there in this capacity do not receive income support". The doctrine considered that this provision of a general nature "could prove suspicious with regard to Community law"[41] in particular with respect to Community jurisprudence, which considers that income support constitutes a "social benefit" and can, under certain conditions, be issued to citizens exercising their right to free movement with a view to looking for work in another Member State.

2. OTHER OBSTACLES TO THE FREE MOVEMENT OF WORKERS?

Law 2008-89 of 30 January 2008 transposes into its Part II Directive 2002/74/EC of 23 September 2002, modifying Directive 80/987/EEC of the Council regarding the merging of the legislation of Member States regarding the protection of salaried employees in cases where the employer becomes insolvent. This law is intended primarily to transpose Articles 8 bis and 8 ter of the Directive. The former stipulates that, in the event of transnational bankruptcy, the institution responsible for the payment of unpaid workers' debts is the Member State on whose territory the latter usually practise or practised their work. It also stipulates that the scope of the rights of salaried employees is determined by the law governing the competent guarantee institution.

The latter envisages a compulsory exchange of information between the competent administrations and guarantee institutions of the various Member States.

Jurisprudence

Court of Cassation, Social Chamber, 12 June 2007, 05-45320. The Court of Cassation rejects the cross-appeal lodged by a company in a case of dismissal concerning a female national of a Member State of the European Union. This person, employed in a clinic, had been wrongly dismissed on the grounds that she did not hold a work document authorising her to practise a salaried activity in France (expired residence card). The company in whose employment the person concerned was working lodged a complaint against the disputed judgement for hav-

[41] LHERNOULD, J.-Ph., Les citoyens européens à la recherche d'un emploi en France sont privés du RMI, *Liaisons Sociales Europe*, no. 173, 5-18 April 2007, p. 5.

ing said that the dismissal of the salaried employee was not justified on genuine and serious grounds. The Court of Appeal had believed that the attitude of the applicant, who refused to prove possession of a valid identity document, could not be described as serious grounds justifying the immediate dismissal of the salaried employee. The Court of Cassation rejected the ground put forward and ruled, "whereas the court of appeal, after having recalled that Article 39 of the Treaty creating the European Community guaranteed the free movement of workers within the European Community, correctly deduced that practice of the activity by the salaried employee could not be conditional upon proof of a current residence card and that, henceforth, failure to present this document did not constitute an offence".

3. SPECIFIC THEMES: CROSS-BORDER WORKERS, SPORTSMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

Cross-border workers

Law no. 2007-1786 of 19 December 2007 for social security financing modifies Article L 325-1 of the Social Security Code. This Article stipulates:

> I. – The local system of compulsory additional health insurance in the *départements* of Haut-Rhin, Bas-Rhin and Moselle guarantees its beneficiaries services provided in addition to those of the general system for salaried employees envisaged under 1, 2, 4 and 7 of Article L. 321-1, to cover all or part of the contribution left to the insured in application of Article L. 322-2 with the exception of those mentioned in II and III of this Article. It can cover all or part of the daily flat rate introduced by Article L. 174-4. These services are defined by the board of directors of the management body for the local system under conditions defined by decree.
> II. – The local system is applicable to categories of socially insured persons in the general system for salaried employees mentioned below:
> (…)
> 5. Holders of replacement incomes, allowances and unemployment benefits referred to in Article L. 311-5, regardless of their place of residence in mainland France or in overseas *départements*, who have either benefited from the local system as salaried employees or who have, as cross-border workers according to Regulation (EEC) 1408/71 of the Council of 14 June 1971 concerning the application of social security systems to salaried employees, to non-salaried employees and to members of their family who move within the Community, fulfilled the conditions for benefiting from the local system of health insurance at the time of their registration with the employment associations in industry and commerce;
> (…)
> 11. Holders of an old-age benefit as part of French legislation or as part of French legislation and the legislation of one or more other Member States of the European Union or parties to the European Economic Area agreement, regardless of their place of residence in mainland France or in overseas *départements*, who have benefited, in their capacity as cross-border worker according to Regulation (EEC) 1408/71 of the Council 14 June 1971 aforementioned, from services equivalent to those provided by the general system and the local health insurance system either during the five years preceding their retirement or their termination of activity, or for ten years during the fifteen years preceding this retirement or this termination of activity, provided they can prove the longer term of membership of a compulsory old-age insurance system for salaried employees, taking into account periods of insurance within the context of the legislations of other Member States of the European Union or parties to the European Economic Area agreement.

Law 2008-126 of 13 February 2008 relating to the reform of the public employment service organisation modifies Article L 5427-1 of the Labour Code, which now stipulates that:

> "Signatories to the agreement referred to in Article L. 5422-20 entrust management of the unemployment insurance system to a private body of their choice.

> The insurance allocation office is insured, on behalf of this body, by the institution mentioned in Article L. 5312-1.
> Recovery of the contributions referred to in Articles L. 1233-69, L. 1235-16, L. 5422-9 and L. 5422-11 is ensured, on behalf of this body, by the unions for the recovery of social security contributions and family allowances and the general social security offices referred to in Articles L. 213-1 and L. 752-1 of the Social Security Code.
> Exceptionally**,** the recovery of these contributions is ensured, on behalf of the management body of the unemployment insurance system:
> a) By a recovery body mentioned in Article L. 213-1 of the Social Security Code appointed by the director of the Central Social Security Bodies Agency, when they are payable with respect to expatriate salaried employees, cross-border workers residing in France who do not fulfil the conditions for benefiting from the provisions of Regulation (EEC) 1408/71 of the Council of 14 June 1971 regarding the application of social security systems to salaried employees, to non-salaried employees and to members of their family who move within the Community, particularly in matters of unemployment insurance, and sailors on ships flying the flag of a foreign State other than a Member State of the European Union, the European Economic Area or the Swiss Confederation, nationals of these States registered in a French maritime district and entitled to benefit from the National Institution for Disabled Mariners; (…)

Maritime sector

The resistance of the French state to Community law, as interpreted by the Court of Justice (C-405/01), finally ceased with the adoption of Law 2008-324 of 7 April 2008 regarding the nationality of ships' crews. This law modifies, on the one hand, Article 3 of the Maritime Labour Law and, on the other hand, Article 5 of Law 2005-412 relating to the creation of the French international register.

The second paragraph of Article 3 of the Maritime Labour Law is now modified as follows:

> "On board ships flying the French flag, the captain and the officer responsible for replacing him are nationals of a Member State of the European Community, of a State party to the European Economic Area agreement or of the Swiss Confederation. Access to these positions is conditional upon possession of professional qualifications and verification of a level of knowledge of the French language and of legal matters enabling ships' documents to be maintained and the prerogatives of public authority with which the captain is invested to be exercised. A decree in the Council of State, taken following the advice of interested organisations representing ship-owners, sailors and fishermen, stipulates the conditions for application of this latter provision.
> Members of the crew are nationals of a Member State of the European Community, a State party to the European Economic Area agreement or of the Swiss Confederation in a minimum proportion fixed by order of the minister responsible for the sea, taken following the advice of interested organisations representing ship-owners, sailors and fishermen, based on the technical characteristics of the ships, their method of operation and the employment situation"

The second paragraph of Article 5 of the law relating to the creation of the French international register is also modified as follows:

> "On board ships registered on the French international register, the captain and the officer responsible for replacing him, who can be the chief engineering officer, who guarantee the safety of the ship, its crew and the protection of the environment, as well as security, are nationals of a Member State of the European Community, of a State party to the European Economic Area agreement or of the Swiss Confederation. Access to these positions is conditional upon possession of professional qualifications and verification of a level of knowledge of the French language and legal matters enabling ships' documents to be maintained and the prerogatives of public authority with which the captain is invested to be exercised. A decree in the Council of State, taken following the advice of interested organisations representing ship-owners, sailors and fishermen, stipulates the conditions for application of this latter provision."

On the other hand, the law frames the conditions for exercising the prerogatives of public authority in accordance with an opinion given by the Council of State on 25 November 2004. The latter had considered that the defence of law and order and the protection of liberties should be placed under the control of French public authorities once they involve the use of constraint and are likely to lead to a deprivation of liberty. Thus, Law 2008-324 concerns modification of the Disciplinary and Penal Code of the merchant navy by introducing five new articles. The latter state:

Art. 28. − The captain takes all necessary and suitable measures with a view to ensuring the protection of the ship and its cargo and the safety of the personnel on board.

Art. 29. − At the request of the competent public prosecutor within the context of Article 37 or with his agreement, the captain can order the confinement in a locked location, for a strictly necessary period, of a person threatening the protection of the ship, its cargo or the safety of the personnel on board when the facilities of the ship so allow. Minors must be separated from any other confined person.

In emergencies, confinement is immediately ordered by the captain. He informs the competent public prosecutor at the beginning of the confinement in order to obtain his agreement.

Art. 30. − When the captain is aware of a crime, an offence or an attempted crime or offence committed on board the ship, in order to preserve the evidence and to find the perpetrators he takes all useful measures or exercises the powers referred to in Articles 54, 60, 61, 62 and in the first paragraph of Article 75 of the Code of Criminal Procedure. Articles 55, 56, 59, 66 and the first three paragraphs of Article 76 of the same Code are applicable. The powers to investigate crime referred to in the present article are applicable to flagrant crimes and offences when the law envisages punishment by imprisonment. The observations and requests of the captain are entered in the disciplinary log. The latter immediately informs the administrative authority by stating the position of the ship as well as the forecast location, date and time of the next port of call. The administrative authority immediately informs the competent public prosecutor under Article 37 of the present code, who can order the ship to change course.

When the person suspected of having committed or attempting to commit a crime or an offence is the subject of a confinement measure, the captain brings him before the closest officer of the criminal investigation department as soon as possible.

When the captain observes an infringement committed on board, he enters it in the disciplinary log.

Art. 30-1. – If the first port of call for the ship is at a French port, the captain immediately forwards, by any means enabling their authenticity to be guaranteed, the documents from the investigation performed in application of Article 30 to the administrative authority within whose jurisdiction this port or the port of registration of the ship is located. Under the conditions envisaged in the third to seventh paragraphs of Article 33, this authority informs the president of the commercial maritime court or forwards the original within five days to the competent public prosecutor under Article 37.

Art. 30-2. – If the first port of call for the ship is at a foreign port, the documents from the investigation are immediately handed to the consular authority. The latter goes on board in order to observe the measures taken by the captain and, where appropriate, to check the confinement conditions of the persons implicated. This person can carry out an additional investigation under the conditions envisaged in Article 30.

If the consular authority deems it necessary to take confinement measures, he immediately informs the competent public prosecutor under Article 37, who may order the person implicated to be held on board with a view to his repatriation.

The consular authority then forwards the file of the proceedings by any means enabling its authenticity to be guaranteed to the public prosecutor, who informs the administrative authority which referred the matter to the courts.

4. RELATIONSHIPS BETWEEN REGULATION 1408/71, ARTICLE 39 AND REGULATION 1612/68

Decree 2007-1739 of 17 December 2007 regulates the conditions for the transnational secondment of workers and modifies the Labour Code. This text, in its preamble, refers to Regulation 1408/71 concerning the application of social security systems.

The new Article R.342-4 of the Labour Code stipulates that a seconded salaried employee benefits from the services of an occupational health service unless the employer, based in a country of the European Union, the European Economic Area or in the Swiss Confederation, proves that this salaried employee is liable to equivalent monitoring in his country of origin. Moreover, if this provision stipulates that an initial regular health examination must be performed before taking up the post, equivalent examinations performed in a country in the European Union or the European Economic Area or in the Swiss Confederation are regarded as regular examinations, including the initial examination.

In addition, the French Labour Code obliges temporary employment agencies to provide a financial guarantee for the cases defined by legislation. Article R 342-9 of the Labour Code does emphasise that,

> "The guarantees underwritten in their country of origin by companies based in a country in the European Union, the European Economic Area or in the Swiss Confederation can be regarded as equivalent to this financial guarantee if they provide the same protection to the salaried employees in question".

The social security management presented a circular, DSS/DACI 2007-13 of 8 January 2007 concerning the consequences regarding social security of the enlargement of the European Union to include two new Member States (Bulgaria and Romania) N**OR**: *SANS0730006C.*

This circular aims to highlight the consequences of enlargement in terms of social security and to provide details about the methods for implementing the coordinating Regulations (EEC) 1408/71 and 574/72 in relationships with these new Member States.

The circular summarises the rules applicable to transitional measures. Thus, the Acts of Accession establish a transitional period of a maximum of seven years (1 January 2007 to 31 December 2013) before nationals of Bulgaria and Romania must enjoy the full benefit of the free movement of persons.

It is not appropriate to describe this system in the present circular, which is very close in its principle to that which has been established for previous accessions, except to state that Bulgarian or Romanian workers wishing to work in France are treated, with effect from 1 January 2007, in the same way as workers from the ten States that joined on 1 May 2004 are treated (who are now, with effect from 1 May 2006, in the second phase of the transitional period that is applicable exclusively to them). This treatment involves a gradual lifting of the restrictions on access to employment, translated initially by a relaxation of the criteria for granting work permit for access to 62 trades said to be "under pressure", in other words ex-

periencing difficulties in terms of recruitment; access to the trades not involved here remains conditional upon acquisition of work permit under the usual conditions.

Only the following elements will be retained:

- during transitional periods the restrictions are aimed at access to the national employment market, which remains regulated by the internal legislation of the State under consideration and the existing bilateral agreements reached with the State of origin of the party in question, but these restrictions only concern salaried employees who go to an older Member State to take up employment in one of its companies. Students, researchers and the self-employed are not affected by transitional periods. The provision of services is free, for Bulgarian and Romanian operators, with effect from 1 January. Retired persons and non-working persons can move freely with effect from this same date under the conditions established in Directives 90/364/EEC and 90/365/EEC of 28 June 1990, regulating their right of residence (the new Directive 2004/38/EC is currently being transposed);
- during transitional periods, the internal rules governing the access of foreigners to employment cannot form the subject of any additional restrictive provision and the current provisions cannot be made more restrictive, as a result of the traditional "standstill" clause referred to in the treaty of accession;
- transitional periods do not affect nationals of the new Member States, regardless of their status (salaried employees or otherwise), in terms of social rights (equality of treatment in matters of employment and working conditions, in terms of social benefits and social security) for themselves and for the members of their families. Regulation 1408/71 is not the subject of any suspensive measure during the transitional periods. Regarding Regulation (EEC) 1612/68, it will be seen that application of the provisions of its Articles 1 to 6 are suspended, during these same transitional periods, in favour of the application of national measures and the measures resulting from bilateral agreements that regulate access to the labour market, not those of Article 7 regarding equality of treatment.

Consequently, transitional periods are not effective in the area under consideration and, from this point of view, Article 7, paragraph 2, of Regulation 1612/68 (equality of treatment with national employees in terms of social and fiscal benefits) and Regulations 1408/71 and 574/72 apply fully with effect from 1 January 2007 to Bulgarian and Romanian nationals.

Transitional periods regarding the free movement of persons, which are aimed only at salaried employees, do not affect the rights and obligations in terms of social security of Bulgarian or Romanian nationals.

Subsequently, the circular establishes in several points the conditions for implementation of Regulations 1408/71 and 574:72 to Bulgarian and Romanian nationals. It emphasises that accession is translated in this area by the immediate adoption of the *acquis* and the two regulations are therefore wholly and immediately applicable in relationships with these two new Member States and with their nationals (who immediately change from the status of nationals of third-party States to the status of citizens of the European Union).

This *acquis* means the regulations, as they have been modified and completed by later modifying regulations, the jurisprudence of the attached Court of Justice and the decisions taken by the administrative commission for their implementation. In particular, Regulation 859/2003, aimed at extending the provisions of Regulations 1408/71 and 574/72 to nationals of third-party countries who are not already covered by these provisions on the grounds

solely of their nationality, is part of this *acquis* and is therefore applicable immediately to nationals of third-party States residing on the territory of one of these two new Member States or residing on the territory of an older Member State and working or staying on Bulgarian or Romanian territory.

Of course, Regulations 1408/71 and 574/72 will apply, taking into account, where appropriate, the notes made in the sections of their appendices concerning the two new Member States.

Regulations 1408/71 and 574/72, as well as the regulations modifying them, completing them or extending their scope are applicable immediately and without restriction to the new Member States and their nationals.

Moreover, the circular points out that since France has reached a bilateral social security agreement with Romania only, Regulation1408/71 takes the place of this bilateral agreement. However, the circular stipulates that the agreement is not repealed and that, in application of the *Rönfeld-Thévenon* jurisprudence of the Court of Justice, its provisions could again be applied in a situation where they would lead to worker who had made use of his right to free movement before 1 January 2007 being granted a benefit greater than that which he would have obtained in application of the provisions of Regulation 1408/71.

Regarding the transitional provisions, the circular states that, taking 1 January 2007 as the effective date for application of the regulations to the territories of these two new Member States and according to the methods that had been retained at the time of previous accessions, the provisions of Articles 94 (transitional provisions for salaried employees) and 95 (transitional provisions for non-salaried employees) of Regulation 1408/71 and Articles 118 (transitional provisions regarding pensions and annuities for salaried employees) and 119 (transitional provisions regarding pensions and annuities for non-salaried employees) of Regulation 574/72.

By contrast, the provisions of Articles 95 *bis* to 95 *octies* of Regulation 1408/71 and of Article 119 *bis* of Regulation 574/72, linked to modifications of Regulations introduced before the accession of new Member States, cannot as a result be applied The traditional transitional measures of the regulations apply at the time of this new enlargement.

The text also refers to situations of secondment on 1 January 2007. Thus, the provisions of Articles 14, paragraph 1, 14 *bis,* paragraph 1, and 17 of Regulation 1408/71 are therefore applied normally and exclusively with effect from 1 January 2007 for all requests corresponding to secondments, extensions of secondment or exceptional secondments and for temporary work performed by non-salaried employees.

With reference to the provisions taken at the time of previous accessions or at the time of the entry into force of the agreement creating the EEA or the agreement between the EU and Switzerland on the free movement of persons, the following rules will be applied to the secondment of salaried employees effective on this date under the provisions of the Franco-Romanian agreement or internal legislation (CSS, Art. L. 761-2):

- with effect from 1 January 2007, interested parties are regarded as being seconded under Article 14, paragraph 1, point a), for an initial period starting on this date, in other words without taking into account the secondment already completed beforehand and the institutions must straighten out the situation of these employees (certificate E 101);
- at the end of the initial period of twelve months, i.e. on 1 January 2008, “if the duration of the work to be performed is extended due to unforeseen circumstances beyond the duration initially envisaged and then exceeds twelve months”, the secondment is regarded as being extended under Article 14, Article 14, paragraph 1, point b);

- if extension beyond twelve months is immediately foreseeable or if the extension to twelve months is not sufficient, a request for extension under Article 17 is conceivable and, exceptionally, will have to be systematically granted in cases where this would involve compliance with an agreement given previously within the context of the Franco-Romanian agreement or internal legislation and covering such long periods of secondment. In any event, however, the maximum duration of the derogations granted under Article 17 will not exceed six years, except in highly exceptional cases (proximity of retirement, current intense and difficult medical treatment, etc.).

Secondments (salaried employees) effective on 1 January 2007 are regarded, with effect from this date, as carried out under the provisions of Regulation 1408/71, provisions becoming effective on this same date, without retroactive effect.

Regarding Articles 13 ff of Regulation 1408/71, the circular stipulates that they apply with effect from 1 January 2007, for Bulgaria and Romania, to new situations and to current situations, with the possible consequence for the latter of a complete or partial change in applicable legislation.

In order to avoid the difficulties inherent in such modifications, the most complete information possible should be given to the interested parties and they should be given an adequate period in which to legalise their situation and fulfil the necessary measures. Some flexibility in the application of deadlines (retroactive effect of late legalisation) will have to be observed and systematic penalties should be avoided in such cases of legalisation.

These changes must be implemented with some flexibility in the assessment of deadlines without systematic penalisation in cases of retroactive legalisation.

Within the context of the legalisation of current administrative situations covered by the bilateral Franco-Romanian agreement, the text envisages that the necessary legalisation measures under Community regulations will have to be achieved with effect from 1 January 2007 and without waiting, if possible, for a request from the interested parties.

Finally, the circular takes into account the external application of French legislation. Thus, in terms of internal French legislation relating to secondment (CSS, Art. L. 761-2) and to the so-called expatriate system (CSS, Art. L. 742-1, 3rd paragraph, 1, and L. 762-1 ff), from now on the provisions and methods used for the older Member States should now be applied to these two new Member States, in particular regarding the lack of overlap, except for disability and old-age risks, between compulsory membership of the social security system of a state (where the legislation is determined as applicable) and voluntary membership of the system of another State (*cf.* Art. 15 of Regulation 1408/71.)

The same is true of the *Decker-Kohll* jurisprudence and is applicable with effect from 1 January 2007 for purchases of medical products and services in these two Member States and the provisions of Articles R. 332-3 to R. 332-6 of the Social Security Code concerning coverage for medical care expenses (products and services) incurred in another Member State are therefore applicable to their territory.

Equally, the provisions pertinent to relationships with the older Member States are applicable from 1 January 2007 to relationships with Bulgaria and Romania.

Jurisprudence

Court of Cassation, Civil Chamber 2, 5 April 2007, 06-10709. Given that, according to the disputed judgement (magistrates' court of Paris I, 25 August 2005), Mr. X has been regis-

tered at the Paris bar since 16 December 1994, he has been a member ipso jure of the State Pension Fund for the French Bars (CNBF); that being also registered at the bar of Madrid, he transferred all his professional activity as a lawyer there at the end of 2001 without giving up his registration at the bar of Paris; that at the request of the CNBF a writ of execution was served upon Mr. X for the recovery of contributions payable for the year 2002.

Given that Mr. X is submitting a complaint to the court for having dismissed his appeal, although according to the grounds, within the framework of the European Union, coverage by a dual system of social security is only possible if it enables the party in question to enjoy "additional social protection", in other words a form of protection that does not discourage the free movement of workers and the freedom of establishment; that this "additional social protection" must therefore be such that it allows an employee who has contributed a certain amount to two national social security systems to enjoy social protection equivalent to that which he would have enjoyed by contributing the same amount to a single system of social security; that simply in saying that Mr. X's membership of the CNBF allowed him to enjoy social protection on national territory, without investigating whether the contributions paid by Mr. X to the CNBF allowed him to enjoy social protection equivalent to that which he would have enjoyed if he had paid the same amount in contributions to just one of the two social security bodies, the court removed the legal basis for its decision with respect to Articles 39 and 43 of the Treaty of Rome creating the European Community;

However, given that it emerges from the jurisprudence of the European Court of Justice that the Treaty does not guarantee a worker that the extension of his activities to more than one Member State or their transfer to another Member State is neutral in terms of social security; that dual liability to social security legislation following these extensions or transfer of activities is not in conflict with the provisions of Articles 48 and 52, now 39 and 43, of the modified Treaty creating the European Community, if the national legislation whose conditions of application are disputed does not place this worker at a disadvantage with respect to those who exercise all their activities in the Member State where it applies and if it does lead to social protection for the worker;

And given that, having found that Mr. X enjoyed social disability-death protection in France as a result of his membership ipso jure of the CNBP, in application of Article L. 723-1 of the Social Security Code, and that these guarantees were the effective counterpart to the contributions claimed, the court has, on these grounds alone, legally justified its decision;

This judgement by the Court of Cassation was criticised in doctrine in the sense that "the solution of dual liability is troublesome since it is contrary to Community law"[42]. According to the author, the jurisdictions involved should, in application of the provisions of Regulation 1408/71, examine the place of residence of a self-employed worker and apply to him the social security law of this country. Thus, membership of the Spanish system by virtue of residence in Spain or principal activity in Spain should lead to Article L 723-1 of the Social Security Code being declared inapplicable and the contributions relating to all the income from French and Spanish activity being paid to the competent Spanish authority. The author should also consider that the solution expressed by the Court of Cassation be regarded as "inexplicable".

Administrative Court of Appeal of Marseilles, 26 June 2007, no. 04MA02205. Mr. X has been liable for payment of generalised social security contributions and for taxes for the reimbursement of social debt. Disputing the payment of these taxes, Mr. X filed an appeal

[42] KESSLER, F., Un double assujettissement contraire au droit communautaire, *Semaine Sociale Lamy*, 25 June 2007, no. 1313, pp. 10-11.

with the administrative court of Nice on the grounds that, with respect both to the provisions of Articles 48 and 52 of the Treaty of the European Community which set forth the principle of the free movement of workers within the European Union and to Article 13 of European Regulation 1408/71 of 14 June 1971, he could not be obliged to make the said contributions since he was already contributing to a social security system of another Member State for the amount of his pension.

The Administrative Court of Marseilles, to which an appeal against the rejection decision of the court of Nice had been referred, judges

> "on the one hand, that the obligation imposed by the law to pay the generalised social security contribution and the tax for the reimbursement of social debt is void of any link with the opening up of a right to a service or a benefit provided by a social security system and, on the other hand, that Mr. X is not disputing, as the administration finds, that the income taken for calculating the disputed contributions constitutes income from property and not income from employment, salaried or otherwise, within the meaning of the aforementioned provisions of Regulation (EEC) 1408/71; that thus, although the European Court of Justice has judged that these same deductions, in as much as they affected salaries and were intended to finance social security systems, were within the scope of Community regulations governing the right to subject cross-border workers to social security contributions, these deductions, as the first judges believed, have the nature of taxes of all kinds and not that of social security contributions within the meaning of national legislative and constitutional provisions and could be imposed upon the taxpayer without ignorance either of Article 13 of the aforementioned regulation or of Article 48, now Article 39, of the Treaty of the European Communities; that Mr. X's arguments on this point must be rejected without there being cause to accede to the conclusions of the applicant tending towards a reference for a preliminary ruling to the European Court of Justice to interpret the said regulation".

Chapter IV
Employment in the Public Sector

Law 2005-843 modified Article 5 *bis* of Law 83-634 of 13 July 1983, regarding the rights and obligations of civil servants. Article 5 *bis* of the law states:

> "Nationals of Member States of the European Community or of a State party to the European Economic Area agreement other than France, have access, under the conditions stated in the general civil service regulations, to the corps, levels of employment and posts. However, they do not have access to posts for which the qualifications either cannot be separated from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives of the public authorities of the State or of other public authorities.
> They cannot hold the position of civil servant:
> 1. If they do not enjoy their civic rights in the State of which they are nationals;
> 2. If they have been convicted in a way incompatible with the exercise of the functions;
> 3. If they are not in a legal position with respect to the national service obligations of the State of which they are nationals;
> 4. If they do not fulfil the physical aptitude conditions required for the exercise of the function, taking into account the possibilities for handicap compensation.
> The individual regulations stipulate, as far as needed, the conditions under which civil servants who are not of French nationality can be appointed to the consultative bodies whose opinions or proposals are imposed on the authority vested with decision-making power.
> Civil servants who benefit from the provisions of the present article can on no account be attributed functions involving the exercise of powers other than those referred to in the first paragraph.
> The conditions for application of the present article are established by decree in the Council of State".

1. ACCESS TO THE PUBLIC SECTOR

Nationality conditions for access to the public sector

Law 2008-324 now ensures conformity of French law with Community law and jurisprudence as regards access by citizens of the European Union to the positions of ship's captain and second in command. In agreeing to give consideration to the criterion of the real and effective exercise of the prerogatives of public authority identified by the Court of Luxembourg, the legislator has now opened the way for the transposition of this interpretation to other jobs in the French public sector, closed to citizens because of the exercise of the prerogatives of public authority. At the very least, this is the perspective revealed by the doctrine. In fact, the latter considers that,

> "One can also suppose that the jurisprudence of ship's captains will contaminate the law of the public sector: should the nationality condition, upheld by French law regarding opening the public sector to Community nationals of 26 July 2005 in terms of posts involving the exercise of the prerogatives of public authority, not be understood as limited to posts involving the effective and habitual exercise of these prerogatives?"[43]

[43] LEMOYNE DE FORGES, J.-M., Les Européens à la barre, *Actualité juridique du droit administratif*, 26 May 2008, p. 953.

Recruitment procedures

Several elements relating to the recruitment procedures are included in the developments devoted to the recognition of diplomas. In fact, the latter open up the right to enter competitions leading to recruitment into the French public sector. Thus, the recognition of diplomas represents a precondition for entry to the competitions that then lead to recruitment.

Recognition of diplomas

Decree 2007-196 of 13 February 2007[44] modifies the system of the equivalence of diplomas, formerly governed by the decrees of August and July 1994, which the Council of State ruled incompatible with Community Law (EC 4 February 2004). Decree 2007-196 pursues a dual objective. It aims to bring into line with Community law the conditions for access to three corps of the public sector (State public sector, territorial public sector and hospital public sector) and means to enable the inclusion of professional experience both by French candidates and by nationals of the European Union.

Article 1 of the decree regarding general provisions states:

> "When recruitment by means of competition into a corps or a level of civil service employment is subjected, in application of the current regulatory provisions, to the possession of certain national diplomas, candidates may enter this competition, subject to fulfilment of the other required conditions and respect for the provisions of the present decree, if they can prove at least equivalent qualifications, demonstrated:
> 1. By a diploma or other training qualification issued in France, in another Member State of the European Community or in another State party to the European Economic Area agreement;
> 2. By any other diploma or qualification marking successful completion of a training course or by any certificate proving that the candidate has successfully completed an academic cycle at least equivalent to that culminating in the required diploma;
> 3. By their professional experience.
> The diplomas, qualifications and certificates mentioned under 1 and 2 must have been issued by a competent authority, taking into account the legislative, regulatory or administrative provisions applicable in the State in question.
> The candidate is obliged to provide, in support of his application, the documents mentioned in the preceding paragraph. These documents are presented, where applicable, in a translation into French produced by a sworn translator."

Article 2 of the decree specifies that the aforementioned provisions cannot be applicable:

- To competitions granting access to jobs within professions, the practise of which is conditional upon possession of a diploma forming the subject, by virtue of European Community directives transposed into internal law, of specific recognition measures;
- To competitions granting access to those in the teaching corps and similar corps and those in the corps of research personnel where entry conditions take into account the qualifications referred to in Article 1 and for which the list is established by order of the minister responsible for the public sector;
- To competitions held within the context of Article 64-1 of the Law of 11 July 2001 aforementioned.

Decree 2007-196 then distinguishes between two types of competition.

[44] Decree 2007-196 of 13 February 2007 regarding the diploma equivalences required for entry to the competitions for entry into the corps and levels of employment in the public sector, *French Official Journal* no. 38 of 14 February 2007, NOR: FPPA0700009D.

The first distinction, covered by Chapter II of the decree, concerns the provisions applicable to competitions open to candidates who hold diplomas or qualifications marking successful completion of a given level of study relating to a general training course or several training specialities. Within this context, the decree makes two distinctions depending on whether recruitment by competition is conditional upon:

- possession of a diploma marking successful competition of a given level of study, without stipulating the speciality covered by this diploma;
  or
- possession of a diploma or document marking successful completion of a level of study relating to several training specialities.

In cases where recruitment is conditional upon possession of a diploma marking successful completion of a given level of study, without stipulating the speciality covered by this diploma, Article 4 of the decree states that candidates enjoy equivalence ipso jure for registering for these competitions once they satisfy at least one of the following conditions:

1. Holder of a diploma, training qualification or certificate drawn up by a competent authority, proving that the candidate has successfully completed a training cycle of at least the same level and duration as those culminating in the diplomas or qualifications required;
2. Prove possession of a registration certificate for a training cycle for which the normal entry condition is as holder of a diploma or training qualification of at least the same level as that of the required diplomas or qualifications;
3. Holder of a diploma or an approved qualification, in application of the aforementioned decree of 9 January 1992, or of a diploma or qualification aimed at a profession, registered in the national directory of professional qualifications and classified as at least of the same level as the required diploma or qualification;
4. Holder of a diploma or training qualification that is at least equivalent, included on an established list, for each level of diploma, by a joint order of the relevant minister, the minister responsible for education and the minister responsible for the public sector.

When recruitment is conditional upon possession of a diploma or qualification marking successful completion of a level of study covering several training specialities, Article 5 of the decree indicates that candidates who hold a diploma or a qualification marking successful completion of a level of study in given training specialities enjoy equivalence ipso jure for registering for these competitions once they satisfy at least one of the conditions listed in Article 4.

Article 6 of the decree provides for the conditions for taking into account professional experience in order to submit an application for these various competitions (see 1.5 below, Recognition of professional experience).

Decree 2007-196 establishes the applicable rules in terms of competitions open to candidates who hold a diploma or specific qualification relating to a particular training speciality. Thus, when recruitment by competition is conditional upon possession of a training qualification or a specific diploma relating to a particular speciality, candidates must submit an application for equivalence. Article 8 of the decree envisages that the application be sent to a commission, which makes a comparison of the knowledge, competence and aptitudes demonstrated by the training qualification(s), possibly supplemented by the professional experience of the candidate with respect to the required qualification or diploma. Only training

qualifications or professional experience covered by the sphere of activity of the profession to which the competition grants entry can usefully be taken into account. In order to make this comparison, the commission takes into account the duration, including where appropriate periods of practical training, of the study cycle needed in order to obtain the required diploma, the subjects covered by this cycle as well as the initial level required to enter this cycle.

Article 9 of the decree stipulates that the Commission recognises equivalence to the conditions of diplomas in the following three cases:

1. When the candidate can prove possession of a training qualification or of a certificate of competence marking successful completion of a study cycle that is equivalent, taking into account its duration and type, to the cycle of study needed to obtain the required diploma(s);
2. When the candidate can prove possession of a training qualification or of a certificate of competence issued by a Member State of the European Union other than France or a party to the European Economic Area agreement, which enables the exercise of a comparable profession in this State, within the meaning of Articles 11 and 13 of Directive 2005/36/EC aforementioned, subject, on the one hand, to this qualification or certificate of competence being of a level at least equivalent to the level immediately below the study cycle needed to obtain the diploma or one of the diplomas required and, on the other hand, to the provisions of Article 10 of the present decree;
3. When the candidate's qualification or diploma is mentioned on a list drawn up for each competition, based on the present chapter, by a joint order of the minister in question, the minister responsible for education and the minister responsible for the public sector.

Article 10 of the decree governs specific situations concerning a candidate who can prove possession either of a training qualification following training that is at least one year shorter than the duration required by the study cycle needed in order to obtain the required qualification, or of a qualification relating to subjects that are substantially different from those covered by the required training qualification. In this case, the commission – after having checked, if appropriate, that the knowledge acquired by the candidate during his professional experience is of a type that compensates wholly or partially for the observed substantial differences in duration or subjects – can require the candidate, at his discretion, to complete a conversion course of a maximum duration of three years or to take an aptitude test prior to his registration for the competition.

However, the provision of the decree stipulates that when the competition culminates in the practise of a profession which requires a detailed knowledge of French law and where one of the crucial and consistent elements of the activity is to provide advice or assistance regarding this law, in other words professions such as lawyer or advisor, the choice between the course and the test is not made by the candidate but by the competent administration. The list of competitions subject to this provision is determined by order of the minister responsible for the public sector.

Finally, Chapter IV of the decree is devoted to the provisions relating to equivalence commissions for qualifications and diplomas. It makes a distinction in the commissions between the three categories of the public sector.

In application of these provisions, the following have been adopted:

- order of 21 September 2007 establishing the rules for referral, operation and composition of the commissions created for the hospital public sector and responsible for mak-

ing a decision on requests for the equivalence of diplomas for entry into the competitions in the hospital public sector that are open to holders of a specific diploma or qualification relating to a particular training speciality;[45]

- order of 26 July 2007 establishing the rules for referral, operation and composition of the commissions created for the State public sector in each ministry or State public establishment, in the Post Office and for the regional Prefects or the director of education and responsible for making decisions about requests for the equivalence of diplomas for entry into the competitions in the State public sector that are open to holders of a specific diploma or qualification relating to a particular training speciality.[46]

As announced in the 2006 report, the government has adopted Decree 2007-1405 of 28 September 2007 regarding the particular status of the corps of architects-in-chief of historic monuments and adaptation to Community law of the rules applicable to the restoration of listed buildings. The corps of architects-in-chief of historic monuments is accessed by competition. Article 2 of the decree stipulates in particular that these competitions are equally open to nationals of the Member States of the European Community or of another State party to the European Economic Area agreement. For these competitions, candidates must demonstrate a qualification and, where appropriate, professional experience equivalent to that required for candidates of French nationality for these methods of entry into the corps.

Two types of competition are held for entry into the corps of architects-in-chief of historic monuments:

- a competition based on tests, open to holders of an architect's diploma recognised by the State, who have the ability to carry out project management;
- a competition based on qualifications, involving an interview with the jury. This competition is open – for one quarter of the total number of posts open to competition within the session – to architects in the French building trades and to architects who hold the specialisation and further studies diploma in "architecture and heritage" or any other diploma of an equivalent level. They must provide proof of regular professional activity in the field of ancient building restoration for the ten years preceding the start of the competition.

An order of 21 February 2007 establishes the list of qualifications or diplomas required of candidates for the external competition based on qualifications for entry into the corps of industrial and mining engineers.[47] Article 3 of the order stipulates that those authorised to enter the competitions for industrial and mining engineer are those who hold diplomas issued in one of the Member States of the European Community or the other States party to the European Economic Area Agreement and for which classification with one of the qualifications or diplomas envisaged above will have been recognised by the commission created in application of the provisions of the decree of 30 August 1994 aforementioned.

Recognition of professional experience for access to the public sector

Decree 2007-196 of 13 February 2007, in application of Directive 2005/36 referred to in the preamble, aims to allow professional experience to be taken into consideration for French

[45] *French Official Journal*, 3 October 2007, NOR: SJSH0766359A.
[46] *French Official Journal*, 23 August 2007, NOR: BCFF0762101A.
[47] *French Official Journal*, 2 March 2007, NOR: ECOP0700040A.

candidates and nationals of the European Union in public sector competitions. Apart from the conditions of diploma recognition, the decree provides for the consideration of professional experience with respect to two situations.

Firstly, recruitment by competition is subject to candidates who hold diplomas or qualifications marking the successful completion of a given level of studies relating to general education or several training specialties. Article 6 of the decree envisages in this case that:

> "Any person who can prove the practice of a professional salaried or non-salaried activity, practised continuously or not, equivalent to a total cumulative duration of at least three years full-time and within the same socio-professional category as that of the profession to which success in the competition grants access, can also apply to enter this competition.
> The total cumulative duration of the experience required is reduced to two years when the candidate can prove possession of a qualification or a diploma at a level immediately below the required level.
> Periods of initial or in-house training, whatever the status of the person, as well as training courses and periods of training in a professional environment completed in preparation for a diploma or qualification are not taken into account when calculating the duration of required experience.
> The methods of application of the present article are detailed, as needed, by order of the minister responsible for the public sector".

This arrangement was applied by an order of 26 July 2007. This order establishes the conditions under which the persons in question can submit their applications.

Under the terms of Article 2, "Those who can apply to enter the competition (…) are candidates who can prove that they have practised a professional salaried or non-salaried activity, practised continuously or not, equivalent to a total cumulative duration of at least three years full-time and within the same socio-professional category as that of the profession to which success in the competition grants access.

The required duration of the professional activity is reduced to two years when the candidate can prove possession of a qualification or a diploma at a level immediately below that required by the status of the corps or level of employment.

The practice of one or more professional activities must have been achieved in posts of a level at least equivalent to those of the jobs in the corps of level of employment to which the competition grants access.

In order to assess the connection between the professional activity practised and that to which the competition grants access, the administration refers to the description of the professions and the list of professions and socio-professional categories of salaried company jobs (PCS ESE) 2003.

Periods of professional activity are also taken into account in professions belonging to comparable socio-professional categories in other States.

Article 3 of the order stipulates that a candidate who requests application of the provisions of Article 6 of the Decree of 13 February 2007 must provide, in support of his request, a detailed description of the post held, of the sphere of activity, the position of the post within the employer's organisation, the level of qualification required as well as the main functions associated with this post.

In addition, he must produce:

- a copy of the employment contract;
- for the periods of activity covered by French law, a certificate from the employer issued under the conditions envisaged in Article L. 122-16 of the Labour Code.

In the absence of the documents mentioned in the two preceding paragraphs, he may also produce any document drawn up by a competent body certifying that the salaried or non-salaried activity was effectively practised in the profession for the period under consideration.

If the documents are not written in French, he is to produce a translation certified by an approved translator.

The administration has the option of requesting presentation of all or some of the pay slips corresponding to the periods worked.

It can request presentation of the original documents; these documents cannot be held by the administration for any longer than the time needed to verify them and must in any event be returned to their owner within a period of fifteen days.

Secondly, the decree establishes the conditions for taking into account vocational training for the competitions open to candidates who hold a specific diploma or qualification relating to a particular training speciality. Article 11 regulates this situation in the following way:

> "A candidate who can prove having practised a professional salaried or non-salaried profession, practised continuously or not, for a total cumulative duration of at least three years full-time within the practice of a profession that is comparable in its nature and level to that which success in the competition grants access can also ask the commission for authorisation to register for the competition. Periods of initial or in-house training, whatever the status of the person, as well as training courses and training periods in a professional environment completed in preparation for a diploma or other qualification, are not taken into account when calculating the required duration of experience.
> When the commission observes that professional experience has not been acquired in a comparable profession, it can suggest that the candidate take, after having defined the content, either a conversion course of a maximum duration of three years or an aptitude test prior to the competition".

2. EQUALITY OF TREATMENT

Recognition of professional experience in determining professional advantages

The status of civil servants is embodied in a law from 1983 concerning the rights and obligations of civil servants and modified on several occasions.

A law of 16 December 1996 created an Article 5 *ter* in the 1983 law, relating to the rights and obligations of civil servants. This provision concerns the calculation of seniority of service required for promotion in State public sectors. Thus,

> "For nationals of Member States of the European Community or of other States party to the European Economic Area agreement who join the corps, levels of employment and employment in the administration of the State, regions, *départements*, communes and their public institutions, the age limit is reduced by a time equal to that effectively spent in compulsory active national service, completed in the forms envisaged by the legislation of the Member State of the European Community or of another State party to the European Economic Area agreement by which they were governed at the time when they completed national service".

The same law of 1996 also introduced an Article 5 *quater* into the 1983 law, concerning the secondment of civil servants. This provision states that permanent State civilian posts, with the exception of judicial magistrates and civil servants of the parliamentary assemblies, can be held, by secondment, by civil servants from within the public sector of a Member State of the European Community or of another State party to the European Economic Area agree-

ment when their powers are either separable from the exercise of sovereignty or do not involve any direct or indirect participation in the exercise of the prerogatives of the State public authorities or of other public authorities.

Jurisprudence

Court of Appeal of Montpellier, 21 November 2007, no. 07/02242. Denis X..., of Belgian nationality, was hired in 1992 by the National Railway Company of Belgium (SNCB) where he held the posts of train manager until 1998 then deputy station manager until 2000. Following his marriage in 1998 to a woman from Hérault and his family's move to this region, Denis X decided to move permanently to France and, in a letter of 19 July 2000, he offered his services to the SNCF in equivalent posts by writing to the Montpellier regional branch of human resources. In a letter of 19 November 2001, the SNCF (Montpellier regional branch of human resources) informed Denis X that his application had been accepted and, in a permanent contract dated 7 January 2002, the party in question was hired by the SNCF on a contract basis at a fixed monthly salary of €1,566.43 and posted to Nîmes for a trial period of 3 months. With effect from 1 April 2004, Denis X was posted to Perpignan as a movement transport technician on a fixed monthly remuneration of €1,874.40.

During the year 2004, Denis X asked his employer to examine his situation with a view to inclusion on the permanent staff. Believing that he had been the subject of discriminatory treatment by the SNCF through the restriction of his right to the free movement of workers guaranteed by Community standards and, in particular, by Article 39 paragraph 1 of the EC Treaty, in April 2006 Denis X brought the case before the Industrial Tribunal of Perpignan in order to prosecute the SNCF. In its judgement of 13 March 2007, the Industrial Tribunal to which the case was referred dismissed all the claims from Denis X. Denis X lawfully lodged an appeal against this judgement.

The Court of Appeal rejects the first grounds raised by the applicant in so far as the request to gain access to statutory employment had been made beyond the age limit envisaged by the articles governing joint relationships for staff of the SNCF.

Secondly, Denis X gives the impression that the SNCF should have taken into account his seniority within the SNCB and should not have imposed the age limit on him. However, the Court recalls that no provision in the articles allows a French candidate to benefit from seniority acquired in another company in order to gain access to statutory employment within the SNCF, such that Denis X cannot claim to have more rights than French nationals.

Subsequently, Denis X maintains that the SNCF should have taken into account his seniority acquired within the SNCB at the level of his remuneration on a contract basis. Here too, the Court of Appeal considers that no provision in the articles, the legality of which are not called into question, forces the SNCF to take into account seniority acquired in another company either by a national or by a national of a Member State of the EEC when establishing the remuneration of the salaried worker on a contractual basis within the SNCF. Thus, the Court concludes that Denis X is not justified in maintaining that the fact that the seniority he acquired at the SNCB is not taken into account in establishing his remuneration in contractual employment within the SNCF represents salary discrimination.

Finally, Denis X is claiming payment of damages on the grounds that the compulsory completion of a trial period in accordance with the articles of the SNCF is in conflict with Community law, in that the professional experience he acquired previously is not taken into consideration. The court points out that the compulsory training envisaged in the articles ap-

plies to all candidates, whether they are nationals or nationals of a Member State of the EEC, and that this is the case regardless of the professional experience previously acquired by the candidate; Denis X was subject to a training period of 3 months, although the articles provide for a one-year training period, which establishes that his professional experience was nevertheless taken into consideration.

Chapter V
Members of the Family

1. RIGHT OF RESIDENCE

For periods of residence shorter than three months, nationals of third-party States who are members of the family of a Community national are subject to no other condition than possession of a current passport (*see above, comments concerning the burden of proof of entry into France).*

For a period of residence longer than three months, the CESEDA, as modified by Law 2006-911 of 24 July 2006 relating to immigration and integration,[48] incorporates family members within the arrangement it devotes to citizens of the Union.

Consequently, the provisions of common law relating to family reunification for foreigners are not applicable to them.[49]

Texts in force

1) The right of residence of European citizens or similar, who are family members of a citizen of the European Union or similar is recognised in Article L.121-1, 4 and 5 of the CESEDA:

> "4. If he is a direct descendant aged under twenty-one or dependent, or a dependent direct ascendant, spouse, dependent direct ascendant or descendant of the spouse, accompanying or joining a national who meets the conditions listed under 1 and 2;
> 5. If he is the spouse or dependent child accompanying or joining a national who meets the conditions listed under 3".

It should be pointed out that the list of family members, established by the CESEDA, does not include the "partner with whom the citizen of the Union has entered into a registered partnership, based on the legislation of the host Member State", as mentioned in Article 2) point 2) of Directive 2004/38. Of particular note is the rejection of a parliamentary amendment aimed at granting a right of residence to persons attached to a Community national by a Civil Solidarity Pact (PACS), on the grounds that this would amount to granting the Community national an advantage above that enjoyed by French citizens[50]. Moreover, French legislation regarding alien law has not recognised a right of entry for the foreign partners of nationals, even registered and even if the PACS seems to constitute a situation, "which

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48 *French Official Journal*, 25 July 2006, p. 11047.

49 The circular of the Minister of the Interior, dated 17 January 2006, refers to it in these terms: nationals of Member States of the European Union (Germany, Austria, Belgium, Denmark, Spain, Finland, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom, Sweden, the Czech Republic, Hungary, Estonia, Latvia, Lithuania, Poland, Slovenia, Slovakia, Cyprus and Malta), as well as their family members, whatever their nationality, are not subject to this procedure. They are covered by the provisions of Decree 94-211 of 11 March 1994, modified most recently by Decree 98-864 of 23 September 1998. The same applies to nationals of States party to the European Economic Area agreement (Iceland, Liechtenstein, Norway), who are also subject to the arrangement of the Decree of 11 March 1994, the benefits of which were extended to them by Decree 95-474 of 27 April 1995. Nationals of the Swiss Confederation are no longer covered by the Code for the Entry and Residence of Foreigners and the Right of Asylum, but by the agreement reached between the European Community and the Swiss Confederation on 21 June 1999".

50 LHERNOULD, J.P., La loi Sarkozy clarifie le droit de séjour des ressortissants européens, *Liaisons Sociales Europe*, no. 158, 7 to 20 September 2006, p. 2.

should be distinguished by the simple relationship of living together".[51] Consequently, the legislator considers that the PACS, although registered, does not confer rights "equivalent" to marriage. The CESEDA is therefore silent on the situation of the "partner with whom the citizen of the Union has entered into a registered partnership, based on the legislation of a Member State if, in accordance with the legislation of the host Member State, registered partnerships are equivalent to marriage and in compliance with the conditions envisaged by the relevant legislation of the host Member State", although envisaged by Directive 2004/38.

2) The right of residence of third-party nationals in the European Union, family members of a European citizen or similar, recognised in Article L.121-3 of the CESEDA (modified by Law 2007-1631), provides that:

> "Unless his presence poses a threat to law and order, the family member referred to under 4 or 5 of Article L. 121-1, depending on the situation of the person he is accompanying or joining, who is a national of a third-party State, has the right to reside anywhere on French territory for a period of longer than three months.
> If he is aged over eighteen or over sixteen if he wishes to practise a professional activity, he must hold a residence permit. This permit, which cannot be valid for a period of less than five years or a period corresponding to the period of residence envisaged for a citizen of the Union within the period of five years, bears the words, "residence permit of family member of a citizen of the Union". Subject to application of transitional measures envisaged by the Treaty of Accession to the European Union of the State of which he is a national, this permit gives its holder the right to practise a professional activity."

This right of residence recognised in the capacity as "family member of a European citizen or similar", therefore requires that a European citizen or similar, who is being joined or accompanied, be in one of the categories put forward in Article L.121-1 1, 2 or 3 of the CESEDA: he must be "*working*" or "*non-working*" within the meaning of these provisions or looking for work (see above).

3) Article L 121-2 of the CESEDA (modified by Law 2007-1631), which is inspired by Article 8 of Directive 2004/38 regarding the formalities to be carried out in the host Member State, envisages that citizens of the European Union and members of their family wishing to establish their habitual residence in France, "are to register with the mayor of the commune of residence within three months following their arrival. Nationals who have not complied with this registration obligation are assumed to have resided in France for less than three months".

The new Article R.121-5 of the CESEDA (modified by Decree 2008-223 of 6 March 2008) states that,

> "A certificate, in accordance with the model established by order of the minister responsible for immigration, is immediately awarded by the mayor to nationals complying with the registration obligation envisaged in Article L. 121-2. This certificate does not establish a right to residence. Possession of it can on no account form a precondition for the exercise of a right or the fulfil-

[51] In this sense, see Circular no. NOR/INT/D/02/00215/C of 19 December 2002 which explains that: "Thus, the legislator did not intend to liken the situation of foreign nationals who have entered into a PACS with a French national or national of the European Union to that of foreigners married to a French person or a citizen of the Union. In fact and in contrast to this latter category, the simple entry into a PACS with a French person or a national of a Member State of the European Union would not involve ipso jure the issue of a residence card since the length of time of their common life would still have to be established. However, taking into account the specific nature of the situation of these PACS partners, which must be distinguished from the simple relationship of living together, and as you have applied it since April 2002, a pragmatic assessment of the criteria of reality and stability of the relationships mentioned above will usually cause you to regard the condition of the stability of the relationships in France as satisfactory, once the parties in question can prove a period of common life in France equal to one year".

ment of another administrative formality. The mayor forwards to the Prefect and, in Paris, the chief of police, a copy of the certificates he has issued".

The new Article R.621-1 of the CESEDA (introduced by Decree 2007-371 of 21 March 2007), finally, envisages that failure to comply with the registration formality is punishable, "by a fine envisaged for fourth-class offences" (in other words, a fine not in excess of 90 euros).

Based on Article 8 of Directive 2004/38, these provisions aim to explain the administrative formalities to which European citizens or similar are subject when they enjoy a right of residence of more than three months in France, by requiring their registration with the Town Hall of their commune of residence without making it "*a precondition*" to a right.

Residence card

Article L.121-3 of the CESEDA envisages that family members who are nationals of third-party countries remain subject to the obligation to hold a residence card:

"Unless his presence poses a threat to law and order, the family member referred to under 4 or 5 of Article L. 121-1, depending on the situation of the person he is accompanying or joining, who is a national of a third-party State, has the right to reside anywhere on French territory for a period of longer than three months.
If he is aged over eighteen or over sixteen if he wishes to practise a professional activity, he must hold a residence permit. This permit, which is valid for a period corresponding to the period of residence envisaged for a citizen of the Union, up to a maximum of five years, bears the words, "residence permit of family member of a citizen of the Union". Subject to application of the transitional measures envisaged in the Treaty of Accession to the European Union of the State of which he is a national, this permit gives its holder the right to practise a professional activity."

Decree 2007-371 specifies the conditions of issue for the residence permit, "EC – family member – all professional activities", in introducing a new article R. 121-14 into the CESEDA, which stipulates that:

"Family members who are nationals of a third-party State mentioned in Article L. 121-3 are to file, within two months of their entry into France, their application for a residence card together with the documents required for entry into the territory, as well as the proof establishing their family relationship and guaranteeing the right of residence of the national who is being accompanied or joined.
If the national they are accompanying or joining does not practise a professional activity, they shall additionally provide proof of the means at this person's disposal for guaranteeing their financial coverage and insurance offering the services referred to in Articles L. 321-1 and L. 331-2 of the Social Security Code.
They receive a residence card bearing the words, "EC – family member – all professional activities", valid for the same period as that to which the national mentioned in L. 121-1 whom they are accompanying or joining is entitled, up to a limit of five years.
The validity of the residence permit is not affected by temporary absences not exceeding six months per year, nor by absences of a longer period for fulfilling military obligations or by an absence of twelve consecutive months for an important reason, such as pregnancy, childbirth, serious illness, study, vocational training or secondment on professional grounds to another Member State or a third-party country.
The renewal of the residence card must applied for within a period of two months preceding its expiry date".

Article R.121-15 of the CESEDA mentions the issue of a receipt to all nationals who apply for this permit and stipulates that the residence permit is issued to nationals of a third-party

State "*at the latest within 6 months following the filing of the application*", in accordance with Article 10, 1) of Directive 2004/38.

Failure to apply for the residence permit within the required periods implies, in application of Article R.621-2 of the CESEDA, a penalty fine envisaged for fifth-class offences (potentially up to 1500 euros). This fine is higher than that applicable for the failure to register, imposed on European citizens and similar (see above).

N.B.: The Council of State had to pass judgement concerning the conformity of Article R.121-14 of the CESEDA with the provisions of Directive 2004/38 and judged that:

> "Article 1 of the Decree (which created a new Article R.121-14 in the Code for the Entry and Residence of Foreigners and the Right of Asylum - CESEDA) contradicts the provisions of the directive since it only envisages a period of two months for a family member of a Community national or similar, who is himself a national of a third-party country, to file an application for a residence card. In fact Article 9 of the Directive of 29 April 2004 provides that this period, "cannot be less than three months commencing on the date of arrival" on the territory of the host Member State (Dir. 2004/38/EC, 20 April 2004, Art. 9)[52]" (EC, 19 May 2008, no. 305670, SOS Racisme).

Maintenance of residence

Family members of a European citizen or similar, who hold the nationality of a Member State of the Union and who have been granted residence maintain the right of residence in France by virtue of Article R 121-7 of the CESEDA, in the following cases:

- in the event of the death of the national who was accompanied or joined or if the latter leaves France;
- in the event of the divorce or annulment of the marriage with the national who was accompanied or joined.

Article R.121-7 states, however, that,

> "for the acquisition of the right of permanent residence envisaged in the first paragraph of Article L. 122-1 of the CESEDA, they must belong individually to one of the categories defined in Article L 121-1" (right of residence in France of European citizen or similar).

The case of family members who are nationals of third-party countries is regulated by Article R.121-8 of the CESEDA, which envisages that the right of residence is maintained in the following cases:

- death of the national who was accompanied or joined and conditional upon having established his residence in France as a family member for more than one year before this death;
- divorce or annulment of the marriage with the national who was accompanied or joined:
  - If the marriage lasted for at least three years before the commencement of the legal divorce or annulment proceedings, including at least one year in France;
  - If care of the children of the national who was accompanied or joined is that person's responsibility in his capacity as spouse, by agreement between the spouses or by legal decision;

[52] *Permanent dictionary* – 2008 update – Bulletin 168.

- If particularly difficult situations so require, specifically when the common life has broken down at the initiative of the family member on the grounds of the marital violence he has suffered;
- If, by agreement between the spouses or by legal decision, the spouse enjoys visitation rights with a minor child, upon condition that this right be exercised in France and for the duration required for its exercise.

Article R 121-8 also stipulates the cases in which these persons can acquire right of permanent residence, i.e.: "for the acquisition of the right of permanent residence envisaged in the second paragraph of Article L.122-1 of the CESEDA, they must belong individually to one of the categories defined in 1, 2, 4 or 5 of Article L 121-1".

Finally and in accordance with the jurisprudence of the Court of Justice, Article R.121-9 of the CESEDA provides that,

> "In the event of the death of the national who was accompanied or joined or if this person leaves France, the children and the family member who cares for them maintain this right of residence until these children complete their schooling in a French secondary education establishment."

Permanent residence card

The law of 24 July 2006, in transposing the Directive, established a right of permanent residence in the legislative section of the CESEDA.

Article L.122-1 of the CESEDA envisages that a European citizen or similar and his family members, also citizens or similar, who have resided legally and without interruption in France for the 5 preceding years acquire a right of permanent residence for the entire territory, unless their presence poses a threat to law and order.

The second paragraph of Article L.122-1 of the CESEDA concerns a family member who is a national of a third-party country, who also acquires a right of permanent residence for the entire territory of France on condition that he has resided in France legally and without interruption with the European citizen or similar for the 5 preceding years. Unlike in the preceding paragraph, the family member who is a national of a third-party country applies for issue of a residence permit valid for a period of 10 years and ipso jure renewable. If he does not apply for the 10-year residence permit, he becomes liable for a fifth-class offence in application of Article R.621-3 of the CESEDA.

Decree 2007-371 incorporates into the regulatory section of the CESEDA Articles R.122-1 to R 122-5, which establishes the conditions and methods for issue of the permanent residence permit.

Article R.122-2 of the CESEDA governs the situation of family members of a citizen and makes a distinction between family members who are nationals of third-party countries and family members of a national of a Member State, subject to a transitional period:

- family members who are nationals of third-party countries, "apply for issue of a residence permit bearing the words "EC – permanent residence – all professional activities" within a period of two months preceding the expiry of the uninterrupted period of five years of legal residence". The permit, which is valid for ten years, must be issued within a maximum period of six months from the time of filing the application. Its renewal must be requested within a period of two months before its expiry date;
- family members of a national of the European Union subject to a transitional period, "are obliged to obtain work permit in order to practise a salaried activity if they have

not previously been admitted to the French labour market for an uninterrupted period equal to or longer than twelve months. In derogation from the first paragraph, their residence permit bears the words, "EC – permanent residence – all professional activities", or "EC – permanent residence – all professional activities except salaried".

Finally, Decree 2007-371 envisages two cases for the issue of the permanent residence permit before expiry of the uninterrupted period of five years:

- the European citizen or similar can acquire a right of permanent residence before the period required in the conditions envisaged in Article R 122-4 of the CESEDA (see above);
- family members, whatever their nationality, who reside with the worker who is a citizen or similar can acquire the right of permanent residence before the period required under the conditions envisaged in Article R 122-5 of the CESEDA:

1. If the worker himself enjoys a right of permanent residence in application of Article R. 122-2;
2. If the worker dies while still practising a professional activity in France and he had been there legally and continuously for more than two years;
3. If the worker dies while still practising a professional activity in France, following an industrial accident or an occupational disease;
4. If the spouse of the deceased worker has ceased to hold French nationality following marriage to this worker.

Administrative practice

Regarding the question of the documents required by the Prefectures from family members of a European citizen, as defined in Article L.121-1 of the CESEDA, it should be noted that the Directive has been transposed (Article R.121-13 of the CESEDA).

Regarding the spouse of a citizen, the CESEDA provides that he will have to submit:

- a passport or identity card;
- a marriage certificate (or possibly the equivalent from the Romanian official family record book) with translation;
- a copy of the spouse's residence card.

If the husband does not practise a professional activity, the question of the couple's means and their health insurance may be broached.

Police Headquarters (PARIS) requests from the spouse of a European citizen:

1) general documents:
   - passport OR identity card;
   - 3 facial photographs (3.5 x 4.5 cm), head uncovered;
   - information sheet ("document requested", enter "EC – family member – all professional activities" - L 121-1, 4. CESEDA);
   - hard-backed form:
2) documents for the spouse of a national of a Member country of the EU:
   - marriage certificate;
   - photocopy of residence permit of your spouse.

These documents do correspond to those listed in the Code (Article R.21-13) and the police departments must pay attention to their details.

Regarding the question of the status of "family members of a European citizen", some observers[53] find that, "preferential treatment" is confirmed with respect to them:

> "Any family member who is a national of a third-party State, mentioned in Article L.121-3 of the CESEDA, is admitted to French territory on condition that his presence does not pose a threat to law and order and that he carries, in the absence of a current residence card, a valid passport or visa or, if one has been issued, a document establishing his family relationship. The burden which the national referred to in Article L.121-1 of the CESEDA may impose on the social security system is evaluated by taking into account in particular the amount of the non-contributory social security allowances that have been awarded to him, the duration of his difficulties and his residence (Articles R.121-1 and R.121-4 created by Directive 2007-371 of 21 March 2007, OJ, 22 March)".

Jurisprudence

Removal of a female national of a third-party country, living conjugally with a European citizen: Ms. Francisca X, of Cape Verdean nationality, was the subject of a deportation order, annulled by the Administrative Court of Pau. Ms. X asserts that she has been living conjugally, since October 2005, with a Portuguese national who has been legally residing in France since 2000 as a salaried employee, with whom she has a child, born in 1993. The Administrative Court of Appeal considers that the party in question, who entered France without a visa, cannot enjoy the status of spouse of a national of the European Community. (Administrative Court of Appeal of Bordeaux, 7 December 2006, *Prefect of Pyrénées-Atlantiques vs. Ms. Francisca X*, 06BX01488).

2. ACCESS TO EMPLOYMENT

Nationals of the European Union, of the European Economic Area or of Switzerland do not need authorisation for residence or employment, in application of Article L 121-1 of the CESEDA, and have free access to all jobs, salaried or non-salaried, with the exception of certain posts in the public sector (see below).

The transitional system applicable to nationals of the new Member States remains subjected to common law for access to salaried posts:

1) The 10 new Member States: from 1 May 2004 to 1 May 2009 (at the latest);
2) The 2 new Member States: from 1 January 2007 to 1 January 2012 (or, in the event of extension, to 1 January 2014).

The Law of 24 July 2006 maintained the obligation to hold a residence card, during the transitional period, for workers of Member States that joined the European Union after 1 January 2004.

Article L.121-2 of the CESEDA provides that,

> "citizens of the European Union wishing to practise a professional activity in France are still required to hold a residence card during the period of validity of the transitional measures possibly envisaged on the subject by the accession treaty of the country of which they are nationals and unless this treaty stipulates otherwise".

[53] *Permanent dictionary*, Update Bulletin - April 2007.

Consequently, nationals from Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Bulgaria and Romania, unlike those from Malta and Cyprus, remain subject to work permit and the labour situation can be invoked against them.

Regarding access to employment by family members of a European citizen, the following should be distinguished:

1) Family members of European citizens or similar who are themselves European citizens or similar

Article R.121-13 of the CESEDA envisages that:

> "The family members mentioned under 4. and 5. of Article L.121-1 who have held their habitual residence in France for more than five years enjoy, upon application, a residence card bearing the words, "EC – family member – all professional activities". Recognition of the right of residence is not conditional upon possession of this document.
> In support of their application, they submit one of the documents envisaged in the first paragraph of Article R 121-1, a proof of their family relationship, as well as of the right of residence of the national whom they are accompanying or joining.
> If the national they are accompanying or joining does not practise a professional activity, they shall additionally provide proof of the means at the latter's disposal to guarantee their financial coverage and insurance providing the services mentioned in Articles L.321-1 and L.331-2 of the Social Security Code.
> They receive a residence card for the same period as that to which the national referred to in Article L.121-1, whom they are accompanying or joining, is entitled, up to a maximum of five years."

2) Family members of European citizens or similar, who are nationals of a third-party country outside the EU

Article R.121-14 of the CESEDA envisages that:

> **"**Family members who are nationals of a third-party State mentioned in Article L.121-3 shall, within two months of their entry into France, file their application for a residence card with the documents required for entry to the territory, as well as the proof establishing their family relationship and guaranteeing the right of residence of the national who was accompanied or joined.
> If the national they are accompanying or joining does not practise a professional activity, they shall additionally provide proof of the means at the latter's disposal to guarantee their financial coverage and insurance providing the services mentioned in Articles L.321-1 and L.331-2 of the Social Security Code.
> They receive a residence card bearing the words, "EC – family member – all professional activities" valid for the same period as that to which the national mentioned in the Article whom they are accompanying or joining is entitled, up to a maximum of five years.
> The validity of the residence permit is not affected by temporary absences not exceeding six months per year, nor by absences of a longer period for fulfilling military obligations or by an absence of twelve consecutive months for an important reason, such as pregnancy, childbirth, serious illness, study, vocational training or secondment on professional grounds to another Member State or a third-party country.
> The renewal of the residence card must applied for within a period of two months preceding its expiry date".

3) Family members of European citizens or similar, who are nationals of a Member State of the EU subject to transitional measures

Article R.121-16 of the CESEDA envisages that:

> "1. – Without prejudice to the provisions of the fifth paragraph of Article L.121-2, nationals of Member States of the European Union subject to transitional measures as a result of their accession treaty, who wish to practise a professional activity in France, are obliged to apply for the is-

sue of a residence permit as well as the work permit envisaged in Article L.341-2 of the Labour Code for the exercise of a salaried activity.
Members of their family who are nationals of a Member State of the European Union subject to transitional measures or of a third-party State are also obliged to apply for the issue of a residence permit as well as the work permit envisaged in Article L.341-2 of the Labour Code for the exercise of a salaried activity.
However, the spouse or descendants aged under twenty-one or dependent are exempt, if the person they are accompanying or joining has been admitted to the French labour market for a period equal to or longer than twelve months on the date of the accession of their State to the European Union or subsequently.
The residence permit of the nationals mentioned in the first paragraph is issued under the conditions and for the period envisaged in Article R.121-10. It bears the words, depending on the case in question, "EC – all professional activities" or "EC – all professional activities except salaried".
The residence permit of the nationals mentioned in the second paragraph is issued under the conditions and for the period envisaged in Article R.121-13 or in Article R.121-14, depending on their nationality. It bears the words, depending on the case in question "EC–permanent residence – all professional activities" or "EC-permanent residence – all professional activities except salaried".

II. – Nationals of Member States of the European Union subject to transitional measures and their family members who are nationals of these same States or nationals of a third-party State admitted to the French labour market for an uninterrupted period equal to or longer than twelve months on the date of accession of their country to the European Union or subsequently and who wish to continue to practise a salaried activity are to apply, upon the expiry of their residence card, for a new residence card, without work permit being required".

For a broader approach regarding access to employment (practical, jurisprudence, etc.) see above (Chapter II – Access to employment).

3. ACCESS TO EDUCATION

The French Constitution of 1946, in its preamble, guarantees equal access by children and adults to education, vocational training and culture. The organisation of public education is free and secular for all. Education is defined as a duty of the State. Consequently, school in France is free (Law of 6 June 1881), compulsory (Law of 29 March 1882) and secular (Laws of 1882 and 1886).

A child can be in school in France from the age of 3 (at a nursery school), but this is not compulsory. On the other hand, schooling is compulsory for children aged between 6 and 16 years old in France.

Registration takes place under the same conditions as for a French national, although a national of a third-party country must submit a document confirming his relationship (birth certificate drawn up by the administration of his country of origin); failing this, a document drawn up by the French administration documenting this relationship (specifically a certificate of universal health coverage). Proof of an address and of up-to-date immunisations must also be provided.

Regarding access to educational and study grants, French law apparently makes no distinction between its nationals and nationals of other Member States. At least, this is what emerges from the provisions of the Education Code regarding the different types of aid for schooling. Thus, Article L531-1 of the Education Code, relating to schooling aid and national grants states, "For every dependent child registered at a public or private school (…) a national school grant is awarded to families whose means do not exceed a variable ceiling depending on the number of dependent children, which is increased in the same way as the

index-linked minimum wage envisaged in Article L. 141-4 of the Labour Code. The amount of the grant, which varies depending on the family's means, is fixed at a percentage of the monthly basis for calculating family allowances, mentioned in Article L. 551-1 of the Social Security Code".

The same applies to back-to-school aid, introduced by Article L 532-1 of the Education Code and the types of aid awarded by territorial authorities in accordance with Article L 533-1 of the Education Code.

With respect to university grants and alongside the grants awarded to students by the State, based on social criteria, several grant schemes have been introduced, enabling "foreign" students to enjoy financial support.

Chapter VI
Relevance/Influence/Monitoring of Recent Court of Justice Judgments

The residence condition imposed by Article L 512-1 of the Social Security Code for the granting of family allowances could be contrary to the *Hartmann* jurisprudence. In fact, a French national residing in Spain and working in France could not enjoy social security allowances in the capacity as cross-border worker, in so far as the allocation of allowances depends on residence in France.

In parallel, the condition of residence on French territory would not visibly permit a Spanish national residing in Spain and working in France to enjoy family allowances in contradiction of the *Geven* jurisprudence.

Regarding the *Jia* jurisprudence of the Court of Justice, it seems that it cannot have an effect on French legislation or regulations. If we consider that the Court of Justice imposes on national authorities exclusively, "that they take into account only the family relationship between the citizen and the third-party national"[54], Article R 121-14 of the CESEDA seems to satisfy this obligation. In fact, the latter states that the family member who is a third-party national is to present, within two months of his entry into France, his application for a residence card together with the documents required to enter the territory as well as evidence establishing his family relationship and guaranteeing the right of residence of the national being accompanied or joined.

The impact of the *Eind* jurisprudence on French law should be minimal. Even if French law does not directly regulate the situation of the return to France of a person who has exercised his right to free movement, the provisions of the CESEDA should be applied in conformity with Community law as interpreted by the Court. In fact, if the French national continues to enjoy the provisions applicable to a European citizen upon his return to the State of origin, Articles 121-1 and following of the CESEDA must be mobilised. Thus, family members who are nationals of third-party countries, who are accompanying or joining the citizen, have the right to reside anywhere on the territory for a period in excess of three months (Article L 121-3 of the CESEDA). Article R 121-1, 2nd paragraph, stipulates in terms of entry that any family member who is a national of a third-party State is admitted to French territory on condition that his presence does not pose a threat to law and order and that he carry, in the absence of a current residence card, a current passport, a visa or, if he is exempt, a document establishing his family relationship. The consular authority issues the required visa upon proof of his family relationship free of charge and as quickly as possible.

Regarding residence, Article R 121-14, 1st paragraph, states that family members who are nationals of a third-party State are to submit, within 2 months of their entry into France, their request for a residence card together with the documents required to enter the territory as well as the evidence establishing their family relationship and guaranteeing the right of residence of the national being accompanied or joined.

NB: For other national jurisprudence concerning the application of Community law by national legal systems, the *rapporteurs* invite the reader to refer to the jurisprudence reproduced in the report.

[54] On this interpretation, see *AJDA* 2007, Actualité du droit communautaire.

Chapter VII
Policies, Texts and/or Practices with Repercussions on the Free Movement of Workers

A decree of 26 December 2007[55] officialises the creation of the ELOI file, after its creation by order of 30 July 2006 was cancelled by the Council of State following an appeal submitted by the signatory associations.

While the cancellation was motivated solely by questions of procedure, the new version of the ELOI file includes some advances. Specifically, the government withdrew the possibility of including in the file the identity of visitors to detention centres and that of those housing foreigners assigned to residence. In addition, while the ministerial order simply stated the data relating to "foreigners in illegal situations", the new decree relates only to "foreigners forming the subject of a removal measure".

On the other hand, data concerning the children of removed foreigners are retained for a period of three years. This results in a file of children who cannot form the subject of measures for removal from the national territory. In addition, the ELOI always includes data on the "*need for particular vigilance with regard to law and order*".

In a joint communiqué, various associations[56] denounce other new aspects of the file:

> "Firstly, it adds a new aim to the ELOI file, that of establishing statistics relating to removal measures and to their execution. These statistics are in no way framed in the decree, which authorises requests based on elements directly or indirectly nominative, such as moreover the note from the CNIL in its advice of 24 May 2007 regarding the draft decree. In addition, the announcement of this aim is in no way trivial in the current context which is above all to achieve the stated objectives.
> Then, the data relating to the foreigner are supplemented by an impressive quantity of administrative and legal data relating to the removal procedure, to the jurisdictional procedures possibly implemented within this framework, to the detention of the foreigner if he is removed while he is in prison. Most of these data will be kept for three years, others for three months".

This type of file should have a limited impact on the free movement of European citizens, since the removal measures in respect of the latter will diminish. However, it is aimed at all removed foreigners and envisages the registration of data concerning the person removed and family members, which may concern a European citizen or a member of his family.

[55] Decree 2007-1890 of 26 December 2007 creating the ELOI project.
[56] Joint communiqué of the CIMADE, GISTI, IRIS and LDH - 3 January 2008, *Fichier ELOI: malgré quelques reculs, l'administration de l'expulsion s'industrialise.*

Chapter VIII
EU Enlargement

With effect from 1 May 2004 or since 1 January 2007, depending on the cases, several persons are similar to nationals of Member States of the European Union: non-salaried workers who immediately enjoy freedom of establishment and the free provision of services of Member States of the EU, as well as students and the "non-working", on condition that they fulfil the conditions imposed by internal law transposing Community regulations.
The most sensitive question to discuss concerning the status of salaried workers, for whom a transitional period (known as "2 + 3 + 2") was introduced, can be divided into three phases:

1) First phase, 2 years, starting on the date of accession (1 May 2004 or 1 January 2007): transitional period for salaried workers from Member States of the EU, at the end of which an overview must be prepared;
2) Second phase, 3 years: possible extension decided and notified by the Commission, with possibility of opening some sectors of activity or suspension of the transitional period at national level;
3) Third phase, 2 years: potential additional phase in cases of genuine difficulties.

For France, the duration of the transitional period during which nationals of the new Member States of the European Union are subject to a work permit can be divided up as follows:

1. Country that acceded to the EU on 1 May 2004 (Estonia, Hungary, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia): overall duration: 1 May 2004 to 1 May 2011 (at the latest);
   1st phase: 1/05/2004 to 1/05/2006;
   2nd phase: 1/05/2006 to 1/05/2009;
   3rd phase (if the French government decides to renew the transitional period): 1/05/2009 to 1/05/2011;
2. Country that acceded to the EU on 1 January 2007 (Bulgaria and Romania): overall duration: 1 January 2007 to 1 January 2014 (at the latest);
   1st phase: 1/01/2007 to 1/01/2009;
   2nd phase (if the French government decides to renew the transitional period): 1/01/2009 to 1/01/2012;
   3rd phase (if the French government decides to renew the transitional period): 1/01/2012 to 01/01/2014.

1. INFORMATION ABOUT THE TRANSITIONAL PERIOD FOR MEMBER STATES THAT JOINED THE EU IN 2004

In France, in accordance with the option offered by the Acts of Accession of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia and Slovenia to the European Union, a transitional period in terms of the free movement of workers has been in force since 1 May 2004, the date of their accession, for the nationals of these eight States. For the duration of this transitional period, nationals of these eight States remain subject to the obligation to obtain a work permit in advance in order to practise a salaried activity on French territory. As the deadline for expiry of the first phase of the transitional period approached, 1 May 2006, the Member States of the European Union which, like France, had operated a transi-

tional period, were bound to carry out an evaluation of their situation in this respect and to adopt a position for the new phase, which runs until 1 May 2009. Several European States decided to lift access restrictions to their labour markets entirely with effect from 1 May next year (Finland, Spain and Portugal). Others decided to maintain the transitional period (Germany and Austria).

The French government, on the occasion of the Inter-ministerial Committee on Europe on 13 March 2006, meeting under the presidency of the Prime Minister, decided to implement a gradual and controlled lifting of the restrictions on the free movement of salaried workers who are nationals of these eight States, with effect from 1 May 2006. The lifting of these restrictions will affect access to certain trades experiencing recruitment difficulties. After analysing the employment situation and consulting the social partners, the list of trades under pressure has been compiled. In order to hold a post in one of these trades, each identified by a ROME code (Operational List of Trades and Jobs), a work permit is still required but the employment situation mentioned in paragraph 1) of Article R. 341-4 of the Labour Code is no longer invoked. Taking into account interest attached to knowing the development of migration flows generated by this decision, the Ministry of Employment has asked the Departmental Directorates of Labour, Employment and Vocational Training to carry out, on behalf of the directorate for population and migration, a rigorous follow-up of requests for work permits concerning nationals of these eight countries and the decisions taken. (Circular of 29 April 2006 relating to work permits issued to nationals of new Member States of the European Union during the transitional period[57]).

A circular of 6 June 2006 provided details about the work permits issued to nationals of the new Member States of the EU who came to take up seasonal employment in the agricultural sector for the 2006 campaign.[58]

1.1 Changes to internal law since the last report

At the end of the first stage of the transitional period imposed on 8 of the 10 new Member States (apart from Cyprus and Malta, which are not affected[59]), and which ended on 30 April 2006, France decided, unlike other Member States, to extend the transitional system until 30 April 2009 at least for nationals of these States wishing to practise a professional activity.

As described above, the Law of 24 July 2006 therefore maintained the obligation to hold a residence card during the transitional period for workers from Member States that joined the European Union after 1 January 2004 (Article L.121-2 of the CESEDA).

Nationals of the Member States of the European Union in question must apply for a residence card and a work permit for access to any salaried employment in France (Article R.121-16 of the CESEDA), but without the employment situation in France being invoked with respect to them in certain cases, in accordance with the desire of France to *"progressively lift the restrictions on free movement":*

- the Circular of the Minister of Employment of 29 April 2006,[60] draws up a list of trades under pressure (see *2006 report*);

[57] Circular DPM/DMI2/2006/200 of 29 April 2006 concerning work permits issued to nationals of the new Member States of the European Union during the transitional period.

[58] Circular DPM/DMI2/2006/200 of 6 June 2006 concerning work permits issued to nationals of the new Member States of the European Union coming to take up seasonal employment.

[59] Nationals of Cyprus and Malta have enjoyed free access to the labour market since 1 May 2004.

[60] Circular DPM/DMI2/2006/200, of the Minister of Employment of 29 April 2006.

- the Circular of the Minister of Immigration of 20 December 2007[61] follows up the Inter-ministerial Committee for Immigration Control (CICI) of 7 November 2007, during which two lists were approved of trades experiencing recruitment difficulties and for which the employment situation will not be invoked: one being open to nationals of the new Member States based on Article L.121-2 of the CESEDA (List of 150 trades open in 2007 experiencing recruitment difficulties)[62].
- an order of 18 January 2008[63] relating to the issue, without invoking the employment situation, of work permits to nationals of the States of the European Union subject to transitional provisions envisages that:
  "Article 1: The employment situation or the lack of a prior search for candidates already present on the labour market cannot be invoked regarding an application for work permit filed for a national of Estonia, Latvia, Lithuania, Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Bulgaria or Romania who wishes to practise a salaried activity in a trade characterised by recruitment difficulties and shown on the list appended to the present order".

In addition, apart from modification of the legislative section of the new Labour Code, published by government edict 2007-329 of 12 March 2007, which entered into force on 1 May 2008, Decree 2007-801 of 11 May 2007 moves ahead with application of rules adopted by the Law of 24 July 2006 and concerns work permits issued to foreigners and modifies certain provisions of the Labour Code.

The new Article R.341-1 of the Labour Code envisages that a foreigner who is a national of a Member State of the European Union subject to the application period of the transitional measures relating to the free movement of workers "*must, in order to practise a salaried professional activity in France, hold a work permit and the medical certificate mentioned in Article R 313-1 of the CESEDA*". On the other hand, in application of Article R 314-1-1 of the same Code, nationals seconded and working on behalf of an employer established on the territory of a Member State or a State party to the European Economic Area agreement or in Switzerland are exempt from this obligation, as are persons who have successfully completed a training course leading to a diploma at least equivalent to a master's at a nationally accredited higher education establishment.

A Circular of the Minister of Immigration of 22 August 2007[64] relating to work permits details application of the Law of 2006 and Regulation 2007-801.[65] It explains that, by virtue of Article L. 121-2 of the Code for the Entry and Residence of Foreigners and the Right of Asylum (CESEDA) and of Article R. 341-1-1 of the Labour Code, nationals of a Member State of the European Union, during the period of application of the transitional measures, are exempt from the need for a work permit or residence card if they hold a diploma of a level at least equivalent to a master's (5 years after the *baccalauréat*) issued by a nationally

61 Circular IMI/N/07/00011/C, of the Minister of Immigration of 20 December 2007.
62 Circular of 20 December 2007, IMI/N/07/00011/C.
63 Order of 18 January 2008, NOR: IMID0800327A, *French Official Journal* of 20 January 2008.
64 DPM/DMI12/2007/323.
65 This circular recalls that salaried workers who are nationals of one of the ten Member States of the European Union during the period of validity of the transitional measures envisaged by the acts of accession (Estonia, Latvia, Lithuania, Hungary, Poland, Czech Republic, Slovenia, Slovakia, Bulgaria and Romania) are subject to the obligation to hold a work permit. Moreover, the circular states that, for the ten Member States that have been members since 1 May 2004, with the exception of Cyprus and Malta, and for the ten most recent members, France has in fact decided to introduce a transitional period in terms of the free movement of salaried workers. This transitional period is of a maximum duration of 7 years, comprising 3 periods of two, three and two years respectively. It can be extended by two years in the event of serious disruption to the labour market. During the transitional period, nationals of the ten States remain subject to the obligation to obtain a work permit in advance in order to practise a professional salaried activity on French territory.

accredited higher education establishment. This exemption is applicable regardless of the date when the diploma was awarded. The list of these diplomas is defined with reference to the order of 21 June 2007 establishing the list of diplomas at least equivalent to a master's. In the event of inspection, the employer or the foreigner will therefore have to prove, by submission of the diploma, that the latter fulfils the conditions for exemption from a work permit. If needed, the inspection service will approach the establishment that issued the diploma in order to ensure that it was the subject of an accreditation order. The parties in question have access ipso jure to the labour market. They can be registered on the list of jobseekers. Their employers are not subject to the obligation check their residence card with the Prefecture.

Article R.341-2 of the Labour Code also stipulates that the required work permit can be represented by the residence permit, "EC – all professional activities", referred to in Articles R 121-16, R 122-1 and R 122-2 of the CESEDA.

1.2. Changes as part of the second phase of the transitional period

Beyond the list of trades drawn up in sectors experiencing recruitment difficulties, Mr. Nicolas SARKOZY, President of the Republic of France, while on a one-day visit to Warsaw on Wednesday 28 May 2008, announced the opening up of the French market, with effect from 1 July, to Poles and to nationals of the seven other former Eastern Bloc countries that joined the European Union in 2004:

> "France has decided to lift all barriers with effect from 1 July", the date of the start of the French presidency of the EU, in other words "one year in advance of what was initially envisaged", announced the French president during a press conference. This is "because France believes in the freedom of movement of persons and goods within Europe", emphasised Nicolas Sarkozy before announcing the news to the two joint chambers of the Polish parliament. (…)
> However, restrictions will remain in force for workers of the two countries to have joined the EU most recently, in 2007: Bulgaria and Romania.
> The Polish president, Lech Kaczynski, also congratulated himself on this opening, describing it as "very important", particularly because it covers all professions. Poland is by far the most populous of the eight Eastern countries that joined the Union in 2004, with 38 million inhabitants. However, Poles remain subject to employment restrictions in Germany, Austria, Denmark, Belgium, Luxembourg and Malta".[66]

> "Poles, Czechs, Slovaks, Slovenes, Latvians, Lithuanians, Estonians and Hungarians will thus benefit in full from the principle of the free movement of workers and the employment situation will thus no longer be "invoked" against them in any trade. Only Romanians and Bulgarians, who did not join the Union until January 2007, will remain subject to an "exceptional" system.
> With the exception of these two countries, France has therefore opened up its labour market to Eastern Europeans. Until now, it had chosen to be "prudent", opting for a very "gradual" opening up. At the time of enlargement in 2004, Paris had started by preventing new European citizens from gaining free access to its labour market, as was authorised by the transitional system which the fifteen older Member States had obtained to implement for protection of their labour markets. France then resolved to open its market partially for the second phase of the transitional period, from 1 May 2006 to 30 April 2009. The new nationals of the Union have access to around sixty trades said to be "under pressure" in May 2006, then to ninety others in November 2007, in total representing 40% of the labour market. In conclusion, France has decided to lift the final restrictions, in advance of the planned schedule.
> The government had to face facts: opening up the market did not lead to a massive influx of workers. Between 1 January 2005 and 31 December 2007, no more than 4,850 Eastern Europe-

[66] "In Poland, Nicolas Sarkozy announces the opening up of the French labour market to eight Eastern European countries", *La Presse canadienne,* 28 May 2008.

ans came to settle in France to work as permanent salaried workers. Around 30,000 seasonal workers can be added to this figure. The flow changes from year to year, "but within reasonable proportions, according to a spokesperson within the government. Language is a barrier and Eastern Europeans have gone initially to countries that opened up their labour markets earlier". In particular, the United Kingdom has received almost one million of them since May 2004.
In fact, most of the fifteen older Member States have already opened up their labour markets. Apart from the United Kingdom, Ireland and Sweden have done so since 2004 without restrictions. Finland, Spain, Portugal and Greece followed suit in May 2006. France and Germany are therefore among the only large countries where restrictions are still in force."[67]

1.3. Details relating to the legal system including relevant legislation applicable to the second phase

The procedure for issuing work permits in favour of these nationals has been simplified and accelerated.

In order to hold a post in one of the trades shown on the list, each identified by a ROME code (Operational List of Trades and Jobs), a work permit is still required but the employment situation is no longer invoked, a criteria underlying most of the denials of a work permit.

Whatever the trade practised, the other conditions envisaged in the legislation remain applicable and will be verified by the Departmental Directorates of Labour, Employment and Vocational Training (DDTEFP), particularly those regarding respect for the equality of treatment (particularly remuneration conditions) and for social security legislation (e.g. payment of social security contributions) by the company wishing to recruit one of these nationals.

The medical examination is still organised by the ANAEM, which receives the fees and corresponding taxes.

When the national of one of these Member States resides in its country and in any event outside France, the employer submits a file to the Departmental Directorate of Labour, Employment and Vocational Training, accompanied by the information and documents required for an investigation of the request (introduction procedure).

It may be necessary for nationals of one of these countries, already residing legally in France, to make a request for change of status in order to hold a salaried post. In this case, the request is submitted to the Prefecture directly by the persons concerned, with the required information and documents (change of status procedure).

Information for companies on the recruitment of workers from the aforementioned States

An employer wishing to recruit a national of one of the aforementioned countries and to advertise his offer of employment can submit it to the competent Local Employment Agency, requesting its registration on the European portal for worker mobility. The Agency may direct the employer to a EURES adviser, associated with the European system of worker mobility. Only the Agency, the public employment service, can carry out this registration. When his offer is submitted, the employer is to stipulate if the pre-selection of candidates is to be performed by the ANPE, in which case the latter will forward the applications received for selection. This offer of employment will thus be displayed on the ANPE web site (www.anpe.fr) and on the European site (europa.eu/eures).

On the latter site, the employer can access the CVs of candidates corresponding to the profile in his job offer by registering at "My EURES".

[67] "France opens its labour market to Eastern Europeans", *Le Monde,* 28 May 2008.

Information for candidates for a salaried job in France about available job offers

After having visited the European portal for worker mobility (europa.eu/eures), a candidate can use the link to the site for the national employment service ("France") and find out about available vacancies with simplified access by using the ROME code for a trade included on the list of trades open since 1 May 2006.

Special case of Poland

This procedure enables employers, if an offer is anonymous, to submit the employment contract to the competent DDTEFP for visa purposes. Once the employment contracts have been favourably approved, they are forwarded by the DDTEFP to the Office of the French Agency for Reception and Welcoming Foreigners (ANAEM, formerly the OMI) in Warsaw.

The ANAEM informs the Polish Ministry of Labour of job vacancies available in France. After publicising them among the regional offices, the Ministry of Labour informs the ANAEM of the interested candidates whose profile corresponds to one of the job offers publicised. These applications will be forwarded to the employer, who can then continue with selection of the candidate, including in Warsaw, with the ANAEM providing its support in this case to organise interviews with the preselected candidates. After selection by the employer, the ANAEM will enter the name of the worker on the relevant employment contract and will move on to his introduction into France.[68]

1.4. Practical problems, individual situations and jurisprudence relating to transitional measures

The main difficulties during this transitional period involve **access to employment** when the trade in question is not on the list of trades open to nationals of the new Member States or if the job held does not fulfil the conditions imposed (applicability of labour market, amount of remuneration, term of contract, etc.). In fact, throughout the transitional phase, the latter find themselves in an interim situation where they have the right to move from their country to France but are subject to common law in order to gain access to employment (work permit, etc.) and can be removed from the territory if they do not comply with the particular rules imposed.

Consequently, the expansion of the list of trades granting access to a job without the effects of the labour market being enforceable and the publication of vacancies on the French market to the majority of Eastern countries, apart from Bulgaria and Romania, are also elements which should enhance the effectiveness of the free movement of workers in France.

2. INFORMATION RELATING TO TRANSITIONAL MEASURES APPLICABLE TO MEMBER STATES ACCEDING TO THE EUROPEAN UNION IN 2007

Transitional measures

Concerning Romania and Bulgaria**,** an initial stage of this transitional period will be applicable to them until 31 December 2008. On this date, France will decide whether to terminate this system or to continue it. In the latter case, it can do so for a maximum period of 3 years,

[68] Practical information from web site: www.travail-solidarité.gouv.fr.

in other words until 31 December 2011. At the end of this period, France can only extend this transitional period for a final time (only for 2 years) if serious disruptions exist on the labour market or if this market is threatened.

Concerning the progress of this transitional phase, a Circular of 8 January 2008[69], regarding social security, recalled the stages:

> "3. *Transitional measures*
> The acts of accession establish a transitional period of a maximum of seven years (1 January 2007 to 31 December 2013) before Bulgarian and Romanian nationals can fully enjoy the free movement of persons.
> In the present circular it is not appropriate to describe this system, which is very close in its principle to that which was established for previous accessions, with the exception that Bulgarian and Romanian workers wishing to work in France are treated, with effect from 1 January 2007, in the same way as workers are currently treated from the ten States which joined on 1 May 2004 (and who are, with effect from 1 May 2006, in the second phase of the transitional period applicable to them in particular). This treatment involves a gradual lifting of the restrictions on access to employment, translated in the first instance by a relaxation of the criteria for granting a work permit for access to 62 trades "under pressure", in other words experiencing recruitment difficulties, while access to the non-affected trades remains subject to acquisition of a work permit under the usual conditions.
> Only the following elements will be retained:
> - during the transitional periods, the restrictions target access to the national employment market, which remains governed by the internal legislation of the State under consideration and the existing bilateral agreements reached with the State of origin of the party in question, but these restrictions affect only salaried workers who go to an older Member State to take up employment in one of its companies. Students, researchers and the self-employed are not affected by transitional periods. The provision of services is free, for Bulgarian and Romanian operators, with effect from 1 January. Retirees and non-workers can move freely with effect from the same date under the conditions established by Directives 90/364/EEC and 90/365/EEC of 28 June 1990 regulating their right of residence (the new Directive 2004/38/EC is in the transposition process);
> - during the transitional periods, internal regulations regarding access by foreigners to employment cannot be the subject of any additional restrictive provision and the provisions in force cannot be made more restrictive, as a result of the traditional "standstill" clause referred to in the accession treaty;
> - the transitional periods do not affect nationals of the new Member States, regardless of their status (salaried workers or others) in terms of social rights (equality of treatment in terms of work and conditions of employment, in terms of social security benefits and social security) for themselves or their family members. Regulation 1408/71 is not the subject of any suspensive measures during the transitional periods. As for regulation (EEC) 1612/68, the provisions of its Articles 1 to 6 have their application suspended during these same transitional periods in favour of application of national measures and measures ensuing from bilateral agreements governing access to the labour market, not those of Article 7 concerning equality of treatment.
> Consequently, the transitional periods are not effective in the area under consideration and, from this point of view, Article 7, paragraph 2 of Regulation 1612/68 (equality of treatment alongside national workers in terms of social and tax benefits) and Regulations 1408/71 and 574/72 are fully applicable with effect from 1 January 2007 to Bulgarian and Romanian nationals.
> The transitional periods in terms of the free movement of persons, which target only salaried workers, do not affect the rights and obligations relating to social security of Bulgarian and Romanian nationals.

Practice and difficulties encountered

Nationals of the two new Member States – Bulgaria and Romania – are for the time being excluded from the prospects of the opening up of the French market.

[69] Circular DSS/DACI no. 2007-13 of 8 January 2007 relating to the consequences for social security of enlargement of the European Union by two new Member States (Bulgaria and Romania).

Now, beyond the practical difficulties linked to the recent accession of these two countries to the EU and to the rules imposed on their nationals during the transitional period, it should be remembered that they face particular obstacles in terms of access to employment, housing, etc.

Some observers even talk of an interim situation for these new European citizens, who would not enjoy the same rules of movement, residence or employment as other European citizens, even those subject to a transitional period and this would be the case in various respects:

- in terms of access to employment: gradual implementation of the list of trades, adaptation of actors to new rules (employers, administrations, etc.), complexity and length of the procedure for applying for a work permit;
- in terms of removal during the three-month period or afterwards: practice has revealed differences in treatment between these nationals and nationals of Member States who joined the Union in 2004. This involves particularly the concept of unreasonable burden, that of a threat to law and order, the proof of entry into France, the deadline given to leave the national territory, humanitarian repatriation or "voluntary returns" not accounted for in the figures for "enforced" removal.

The Annual Report to the Parliament concerning the trends in immigration policy in December 2007 states that, for the year 2006, 5,800 Romanians were removed (2nd place among removed nationalities). On the other hand, for the six months of 2007, Romanians are no longer among the 6 most frequently removed nationalities (page 144). The same Report to the Parliament reveals a significant increase in the number of removals within the context of "humanitarian assisted return"[70], which benefited chiefly the following nationalities, "Algerians, Malians, Romanians, Bulgarians (…). In fact for 2006 it was given to 548 persons, as opposed to 757 for half of the year 2007[71] (page 126).

Various observers (CIMADE and ROMEUROPE) wonder about the link between the objectives in figures given by the government (25,000) and the number of removals and/or "assisted" returns observed with regard to nationals of the two new Member States of the EU (Romanians and Bulgarians):

The CIMADE report wonders about this question:

> "In *2006*, Romanian and Bulgarian nationals represented *almost 30% of deportations* effectively executed in France. We denounce the absurdity of their large-scale return while they already had the right to move within the Schengen area and their countries were preparing to join the European Union (EU). We explained that this population had been particularly targeted and had thus been the topic of the politics of figures. Often living on sites on the margins of conurbations, thus making questioning the easiest to carry out and in an unclear legal situation, nationals of these two countries, often Romanians, were expelled in their hundreds, often on specially chartered aeroplanes. On 1 January 2007, Romania and Bulgaria became full members of the EU. (…) However, throughout the year *2007*, we have observed that Romanian and Bulgarian nationals *continued to be the focus of particular attention* by the police and prefectural administrations.

[70] "2 –Humanitarian assisted return (HAR):
HAR has two differences with respect to VAR: the amount (153 euros); the scope; it indiscriminately benefits foreigners in an illegal situation and foreigners in a legal situation but in a destitute situation and wishing to return to their country of origin. Finally, it can also extend to nationals of countries excluded from the scope of VAR", Fourth Report to Parliament, *Les orientations de la politique de l'immigration,* December 2007, p.126.

[71] "In total, the number of beneficiaries of various forms of assisted return was therefore 2,539 persons in 2006 and 2,085 by 31 August 2007", Fourth Report to Parliament, *Les orientations de la politique de l'immigration,* December 2007, p.126.

> Thus, they accounted for 20% of the foreigners placed in the Administrative Detention Centre (CRA) in Nantes, almost 10% of those detained at the Centre in Rennes, etc.. These high figures are in no way comparable to the number of nationals from the other new Member States of the EU who are the placed in detention. The removal measures taken against them are most often disputable. The Administration has regularly used the threat to law and order as the basis of its reasoning. In almost all cases, the offences with which the persons in question were charged were petty crimes and did not generally give rise to any criminal proceedings. They could not, in any of the cases, correspond to the Community definition of the concept of threat to law and order. The fact that some people constituted an "unreasonable burden on the social security system" was also invoked. It seems to us that this reasoning should also be set aside: Romanian residents have access to virtually no social security allowances. As a result and regardless of the duration of their residence in France, it is not possible to consider that they represent an "unreasonable burden" on the social security system[72].

The national human rights group, ROMEUROPE, also draws attention to different aspects:
It recalled, in a communiqué of 22 May 2008, following the visit to France of Thomas HAMMEBERG, Human Rights Commissioner of the Council of Europe, that:

> "They group these handicaps together with those linked to the status of foreigner, who – even after the entry of the countries of origin into the European Union on 1 January 2007 – remains synonymous with exclusion. Beyond three months in practice, their legal residence in France is subject to *conditions regarding means*, which it is very difficult to satisfy since access to employment was blocked as a result of the complexity and demands of the procedure for obtaining a work permit, even for these European citizens. The destitution in which they find themselves trapped then serves as a pretext for evacuating their dwelling places within the context of return operations organised jointly by the police and the ANAEM. (…) These practices highlight the total contradiction between the policy of return implemented by the government and the freedom of movement in force within the European Union. Moreover, this arrangement is entirely ineffective with regard to the stated objective of the absorption of shanty towns. *Most Romanians "voluntarily" repatriated quickly return to France* where their numbers (around 6-10,000) have remained constant since 1989. These enforced wanderings further unsettle these persons in their ongoing life projects (professional insertion, schooling, care, etc.)[73].

In so far as Bulgarian and Romanian nationals can return to France following "enforced" or "assisted" removal, the question of their administrative and professional situation in France is still relevant within the same terms. This is equally an element that directly affects the free movement of persons in the European Union, even though the transitional period must in theory be punctuated with national evaluations, possible modifications of applicable rules, if necessary, within the meaning of a *"gradual lifting of the restrictions on free movement"*.

[72] *CIMADE Report*, 2007, pages 6-7.
[73] Communiqué of 22 May 2008 of the Romeurope National Human Rights Group following the visit to France of Thomas HAMMEBERG, Human Rights Commissioner of the Council of Europe.

Chapter IX
Statistics

Source: Report to the Parliament on the trends in immigration policy (December 2007)

Foreign nationals covered by Community law (citizens of Member States of the European Union or of the European Economic Area and their family members, whatever their nationality) enjoy a privileged right of residence since they enter France carrying a simple identity document. In fact, their system of residence is the direct result of the Treaties creating the European Community, implemented in France essentially by regulatory means (Decree of 11 March 1994, modified).

The Law of 26 November 2003 removed the obligation to hold a residence card for nationals of these States as well as the Swiss Confederation. These nationals can therefore reside and work in France without being bound to apply for a residence card. However, they reserve the right to make such a request for personal reasons to the offices of the Prefect.

The Law of 24 July 2006 relating to immigration and integration having introduced an obligation to register with the mayor of their commune of residence, for European nationals wishing to settle in France, it will however be possible, based on the statistical use of statement certificates issued by the mayors, to count settlements in France by these foreigners.

With regard to nationals of the new Member States of the European Union since 1 May 2004 and with the exceptions of Cyprus and Malta, transitional measures were introduced that make it compulsory for them, if they wish to practise an economic activity in France, to apply for a residence card serving as a work permit for the entire duration of the transitional period, which could be from 2 to 7 years.

As soon as a Community national wishes to be granted a residence card or if he is obliged to do so, the conditions for issue are fixed by the Decree of 11 March 1994 modified.

Extracts from the fourth report to the Parliament on the trends in immigration policy (December 2007)

2.2 – Statistics

2.2.1 – General presentation

The figures given in this section do not necessarily correspond to physical entries to the territory. In fact, documents issued in any year can correspond to:

- actual entries in the year or during the previous year, since some foreigners use a provisional document for a period of several months before the issue of a residence card;
- admissions for residence by way of exception;
- changes in the status of foreigners present in a legal situation using their travel document and, where appropriate, a short-stay visa (maximum 3 months) and who transfer to long-stay category;
- minor foreigners who entered for the purposes of family reunification during previous years, who go to the Prefecture upon reaching the age of majority to obtain a residence card.

On the other hand, the first-time issue of a document in a given category to a foreigner who already held a document but in a different category is regarded as a renewal, not as a first issue.

Moreover, neither foreigners to whom temporary residence documents are issued (convocation, provisional residence authorisation (APS) or receipt of application for first residence card) nor holders of diplomatic cards are recorded.

All the figures relating to first residence cards are produced by computer processing, taking into account the background to the right of residence in the computerized file for each foreign national. Issue of a residence card is regarded as a first issue:

- if no other previous residence card is shown in the interested party's file;
- when a period of one year of more has elapsed between the date of expiry of a previous card and the date of commencement of the card issued (in this case, the provisional documents are taken into account for calculating the interruption to the right of residence).

In 2004, 2005 and 2006, the offices of the ministry responsible for the interior issued 206,642, 197,788 and 194,303 residence cards respectively, including those issued at their request to Community nationals who are not subject to an obligation to hold a card. A comparison of these global volumes with those of the preceding years has become impossible as a result of the changes in the geographical perimeter of this administrative activity of issuing cards which took place during the years 2003 and 2004 under the effect of the Law of 26 November 2003 relating to immigration control, the residence of foreigners in France and nationality which eliminated – for foreign nationals covered by Community law – the obligation to hold a residence card.

The Treaty of Accession to the European Union of 10 new countries, signed on 17 April 2003 and effectively entering into force on 1 May 2004 envisages transitional periods in favour of States already members. In particular, with the exception of those from Malta and Cyprus, nationals of the new Member States must, as of 2004 and for the entire duration of the transitional period, apply for a residence card if they wish to work in France.

Within these global volumes, the following have been identified:

- the 6,264, 2,859 and 2,828 cards issued in 2004, 2005 and 2006 respectively in favour of nationalities usually not subject to the obligation to hold a residence card;
- the 191,850, 187,134 and 183,575 cards issued in 2004, 2005 and 2006 respectively in favour of third-party country nationalities;
- the 8,528, 7,795 and 7,900 cards issued in 2004, 2005 and 2006 respectively in favour of nationals from the new Member States, including Romania and Bulgaria.

2.2.2 – Development according to reason for issue

Developments over the period 2000-2006 in the following components of the summary table following will be listed below, according to the reason for issue:

A. The volumes of first documents issued to nationals of countries for whom the possibility of residing long-term in France is conditional upon acquisition of a card (200,378 cards in 2004, of which 191,850 for third-party countries and 8,528 for the 10 NMS; 194,929 cards in 2005, of which 187,134 for third-party countries and 7,795 for the 10 NMS; 191,475 cards in 2006 of which 183,575 for third-party countries and 7,900 for the 10 NMS) – (Tables III-7 and III-8 bis);

B. The volumes of first documents according to the legal type (Tables III-9 to III-13):

- B1. Temporary residence permits (132,468 cards in 2004, 127,694 in 2005 and 131,225 in 2006);
- B2. residence permits (30,491 cards in 2004, 31,316 in 2005 and 24 113 in 2006);
- B3. retirement cards (456 cards in 2004, 291 in 2005 and 240 in 2006);
- B4. Algerian residence permits (33,916 cards in 2004, 31,344 in 2005 and 31,050 in 2006);
- B5. Community cards (9,311 cards in 2004, 7,143 in 2005 and 7,675 in 2006).

Following a decline of 2.5% in 2005, the volume of cards issued to nationals of third-party countries falls by 1.9% in 2006, but this overall trend hides contrasting fluctuations:
–3.5% for economic immigration from these countries;
–3.0% for admission for residence by students;
+4.1% for family immigration (this movement is the result of the exceptional legalisation of parents with children at school);
-32.7% for admission for residence by refugees.
(…)

B5 – Community cards and European Economic Area cards
The permanent Community national permit is issued to a Community worker and to family members under the conditions fixed by the Decree of 11 March 1994 modified.

The year 2004 was marked by a massive reduction in the total of first residence cards issued, which is a direct result of the elimination of the obligation for Community nationals to hold a residence card. Nonetheless, it should be pointed out that nationals of the new Member States of the European Union, with the exception of Cyprus and Malta, remain subject to this obligation if they wish to practise a professional activity during the transitional period. France, in the wake of most of the older Member States, has in fact wanted to opt for this possibility of protecting its labour market for an initial period of 2 years, i.e. until 1 May 2006. Despite the selective opening up for nationals of the new Member States of access to certain trades, suffering from a shortage of manpower since 1 May 2006 the arrangement relating to the issue of cards and the associated procedure have remained unchanged.

Following a new decline in 2005 (-24% compared to 2004) in the total of first residence cards issued to nationals of the European Union and the European Economic Area, cards of this type show an increase of 7.4% in 2006, which can chiefly be explained by the opening up effective from 1 May 2006, characterised by the modesty of its effects (see box, page 83 Impact of the opening up of 62 trades to nationals of the NMS).

Table III-13 – First Community residence cards and European Economic Area residence cards relating to the years 2002 - 2006 (mainland France)

	2002	2003	2004	2005	2006
1 – Family of French national	2,297	2,193	515	523	607
2 – Family member	7,605	7,624	2,346	2,042	2,099
3 – Personal and family relationships				1	1
1 – Non-salaried worker	1,086	1,095	333	408	532
4 – Salaried worker	14,756	14,102	2,091	1,953	2,503
5 – Seasonal or temporary	7,903	7,679	928	263	160
1 – Visitor	6,983	7,523	1,609	1,014	895
2 – Student or trainee	10,637	8,515	903	728	732
9 – Retiree or pensioner	4,211	4,774	582	191	139
11 – Various reasons		3	4	20	8
Total	**55,478**	**53,508**	**9,311**	**7,143**	**7,675**

* Family reunification

Source: SG-CICI/mission statistics from DLPAJ

Issue of first residence cards 2004-2006 in mainland France (extract from the report to the Parliament on trends in immigration policy, December 2007)

Year 2004	Community cards
Nationalities not subject to residence card	5,962
10 new Member States	1,954
Third-party countries	1,395
Total	**9,311**

Year 2005	Community cards
Nationalities not subject to residence card	2,754
10 new Member States	2,950
Third-party countries	1,439
Total	**7,143**

Year 2006	Community cards
Nationalities not subject to residence card	2,735
10 new Member States	3,480
Third-party countries	1,460
Total	**7,675**

Statistics relating to economic immigration

3.1 – Labour immigration from the new Member States of the European Union

The year 2006 was marked by the opening up of simplified access to the French labour market to nationals of the new Member States of the European Union subject to transitional measures, with effect from 1 May.

One year after this opening up, the outcome of this measure remains modest.

Impact of the opening up of 62 trades to nationals of the new Member States (NMS).

On 28 April 2006, a list was published of 62 trades characterised by recruitment difficulties. Since 1 May 2006, employers wishing to recruit foreigners who are nationals of the new States in the Union in order to practise a trade registered on this list cannot be affected by the employment situation by the administrative authority responsible for issuing work permits.

This affects the 8 new States that joined the EU on 1 May 2004 and subject to transitional measures: Estonia, Hungary, Latvia, Lithuania, Poland, the Czech Republic, Slovakia and Slovenia.

Since their accession on 1 January 2007, Bulgaria and Romania benefit from the same arrangement.

Overall, with respect to total immigration into France, the impact of this opening up is marginal. If we do not take into account Bulgarian and Romanian nationals, it is lower than the spontaneous increase in the number of entries of worker nationals of third-party countries.

Over the year July 2006 to June 2007, in other words the second half of 2006 and the first half of 2007, 3,214 foreign nationals of the 8 NMS received a work permit (apart from seasonal workers), compared to 2,040 during the preceding 12-month period, or growth of 1,174 persons in one year.

In respect of third-party countries to the European Union and the European Economic Area, the comparable figures are 17,869 and 16,495 respectively, or 1,374 additional entries in one year, although the labour market had not yet been opened up to these nationals.

Work permits *(apart from seasonal workers)*

	July 2005-June 2006	**July 2006-June 2007**	**Difference**	**%**
8 NMS	2,040	3,214	1,174	57.5%
Bulgaria	184	351	167	
Romania	880	1431	551	
Third-party countries	16,495	17,869	1,374	8.3%
Total	19,599	22,865	3,266	16.7%

Prospects for the year 2007

As a result of the erratic and seasonal nature of monthly figures, the mobile average over 12 months provides the best information about monthly developments.

The graph below shows that the effects of the opening up of 1 May 2006 were not noticeable until the autumn of 2006. The annual trend could, based on figures for the 12

months from July 2006 to June 2007, stabilise around 3,500 to 4,000 entries per year for the 8 NMS alone.

The opening up of the market to Bulgarians and Romanians is too recent to have revealed a trend. However, the change in the first 6 months of 2007 has been very rapid: 289 Romanians and 92 Bulgarians in June 2007 compared to 71 and 15 as monthly averages in 2006. In terms of numbers on a monthly basis, Romanians and Bulgarians already exceed the totals for the 8 NMS by the end of the first half of 2007.

Statistics produced by the National Institute of Demographic Studies (INED)

By year, nationality and continent

	1994	2000	2001	2002	2003	2004	2005
EU-15 (1)	47,697	43,282	42,552	42,744	42,085	40,000*	40,000*
New Member States (2)	2,276	3,313	3,932	4,242	4,426	3,217	2,876
Other European nationalities (3)	11,243	15,316	17,526	20,036	21,286	23,168	24,406
Africa	34,748	64,181	78,753	94,317	101,658	100,567	95,309
Asia	13,123	21,001	25,234	29,027	30,346	29,310	29,274
America	9,797	12,776	14,083	14,682	14,958	14,917	14,941
Others	679	558	614	659	638	684	756
All nationalities	119,563	160,428	182,694	205,707	215,397	211,863	207,562

Field: mainland France

1) Member States of the European Union + Iceland, Liechtenstein and Norway

(2) Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic

(3) Including Turkey.

* Since the Law of 26 November 2003, possession of a residence card has become optional for foreign nationals of the 14 older Member States. This produced a significant decrease in the number of cards issued. In order to correct for this under-evaluation provisionally, an estimate was made, which establishes the level of these migration flows at 40,000 for 2004 and 2005. The estimate by nationalities identified for this geographical zone is not given in the tables.

Source: preparation by INED from sources forwarded by the Ministry of the Interior and the statistical directories of the French Agency for Reception and Welcoming Foreigners, cf. X. Thierry, Population, no. 5, 2004.

Chapter X
Miscellaneous

Texts

The Order of 5 January 2007 of the Minister for National Education[74] establishes the conditions for assessing the equivalence of qualifications or diplomas submitted by European students who are eligible for the third cycle of medical studies, targeting specifically Directive 2005/36/EC relating to the recognition of professional qualifications. Its first article indicates that the candidates targeted in the third paragraph of Article 1 of the Decree of 16 January 2004 aforementioned can gain access to the third cycle of medical studies on condition of having followed medical training in accordance with Article 24 (3) of Directive 2005/36/EC of 7 September 2005 aforementioned, including at least six years of study or 5,500 hours of theoretical and practical education given at a university or under the supervision of a university.

These candidates must forward to the ministry responsible for health, before organisation of the selection procedure for house physicians, a certificate from their educational establishment of origin stating that the training followed meets the requirements envisaged in Article 1 of the present order, that it leads to a diploma granting the right to practise the profession of doctor and that the qualification, certificate or diploma they submit grants access, in the country where it was awarded, to training as a specialist doctor. These documents must be written in French or, failing this, be accompanied by a translation produced by a sworn translator.

Jurisprudence

Court of Cassation, Social Chamber, 12 June 2007, 05-45320. The Court of Cassation rejects the cross-appeal lodged by a company in a case of dismissal concerning a female national of a Member State of the European Union. This person, employed in a clinic, had been wrongly dismissed on the grounds that she did not hold a work document authorising her to practise a salaried activity in France (expired residence card). The company in whose employment the person concerned was working lodged a complaint against the disputed judgement for having said that the dismissal of the salaried employee was not justified on genuine and serious grounds. The Court of Appeal had believed that the attitude of the applicant, who refused to prove possession of a valid identity document, could not be described as serious grounds justifying the immediate dismissal of the salaried employee. The Court of Cassation rejected the ground put forward and ruled, "whereas the court of appeal, after having recalled that Article 39 of the Treaty creating the European Community guaranteed the free movement of workers within the European Community, correctly deduced that practice of the activity by the salaried employee could not be conditional upon proof of a current residence card and that, consequently, failure to present this document did not constitute an offence".

[74] *Official Journal* no. 14 of 17 January 2007, p. 1022.

Reports

General Secretariat of the Inter-ministerial Committee for Immigration Control, *Les orientations de la politique de l'Immigration*, Report to the Parliament, Fourth Report drawn up in application of Article L 111-10 of the Code for the Entry and Residence of Foreigners and the Right of Asylum, December 2007, 228 pp.

CIMADE, *Centres et locaux de rétention administrative*, 2007 Report, 299 pp.